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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1936

## No. 298

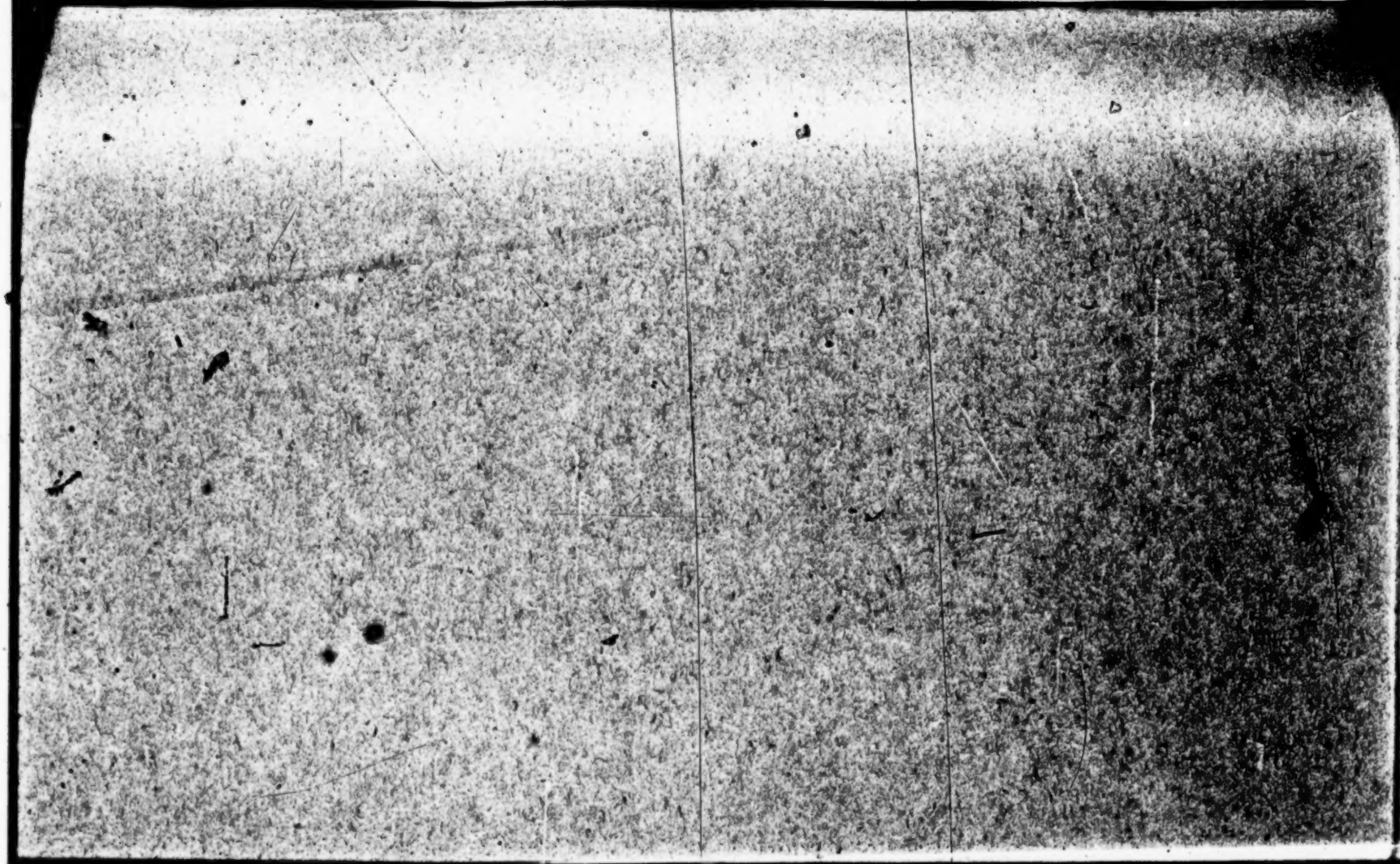
STOCKHOLDERS OF PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, APPELLANTS,

vs.

WARREN F. STERLING, RECEIVER FOR PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, ETC.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED JANUARY 30, 1937



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*vs.*

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

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STATE OF MARYLAND

VS.

THE PEOPLES BANKING COMPANY

OF SMITHSBURG, MARYLAND

A Body Coporate

NO. 12,277 EQUITY

IN THE CIRCUIT COURT

FOR WASHINGTON COUNTY

SITTING AS A COURT OF EQUITY

TITLING

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| STATE OF MARYLAND<br>Vs.<br>THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,<br>A Body Corporate | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

Upon the filing of a proper Bill of Complaint and other necessary prerequisites, a decree was duly passed under which John J. Ghingher, Bank Commissioner of the State of Maryland duly qualified as Receiver of said Bank.

PETITION AND ORDER OF COURT THEREON DETERMINING STOCKHOLDERS' LIABILITY AND AUTHORIZING RECEIVER TO COLLECT AND ENFORCE PAYMENT THEREOF.

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| STATE OF MARYLAND<br>Vs.<br>THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,<br>A Body Corporate | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>SITTING AS A COURT OF EQUITY |

To the Honorable, the Judges of said Court:

This, the petition of John J. Ghingher, Bank Commissioner for the State of Maryland, Receiver for The Peoples Banking Company of Smithsburg, Maryland, respectfully shows unto your Honors:

1.—That the defendant, in the pursuance of the provisions of Article 11 of the Annotated Code of Maryland, on the 24th day of January, A. D., 1910, became a banking corporation of the State of Maryland, having its principal office at Smithsburg, Washington County, Maryland, and having a total amount of capital stock of $20,000.00, the said capital stock being divided into two thousand shares of the par value of $10.00 each, the certificate of incorporation being duly certified that the same was executed in conformity with law by M. L. Keedy, an Associate Judge of the Fourth Judicial District in the State of Maryland, and being recorded

in Liber No. 2, folio 137, one of the Charter Records for Washington County, Maryland, the same having been recorded February 3rd, 1910, a duly certified copy of the same marked "Exhibit Certificate of Incorporation" being herewith filed as part hereof.

2.—That under the provisions of the said certificate or article of incorporation, the defendant began to function and continued to function as a banking corporation until the 13th day of January, 1922, when Article 4 of said certificate or articles of incorporation was changed and amended so as to read as follows: "The total amount of the capital stock of said Bank is $20,000.00 divided into 2,000 — of the par value of $10.00 each be and the same is hereby changed to read as follows: 'The total amount of capital stock of said Bank is $40,000.00 divided into 4,000 — of the par value of $10.00 each.' The price to be paid for the new stock is $25.00 per share."

And that said certificate or articles of incorporation were duly approved by George W. Page, Bank Commissioner of the State of Maryland and certified that the same had been duly submitted to Frank G. Wagaman, an Associate Judge of the Fourth Judicial Circuit of the State of Maryland, and by him further certified that the same were executed in conformity with law and duly recorded in Liber No. 3, folio 30, one of the Charter Records for Washington County, Maryland, having been recorded January 13, 1922, a duly certified copy of the same marked "Exhibit Amended " being herewith filed as part hereof.

3.—That all of the shares of the capital stock of the said defendant corporation, authorized by said amendment, to wit: The number of 4,000 shares of the par value of $10.00 each were issued and outstanding at the time your petitioner took charge of its affairs and assets.

4.—That by Section 39 of Article III, of the Constitution of Maryland, it is provided as follows:

"The General Assembly shall grant no charter for banking purposes, no — renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise . . . "

5.—And that by Section 72 of Article 11 of the Annotated Code of Maryland it is provided as follows:

"Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee, shall not be personally subject to any liability on such stock, but the one pledging stock, and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares; and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation and shall be enforceable only by appropriate proceedings by a Receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction. Nothing in this section or article shall be construed to repeal or effect the existing rights of creditors or liabilities of stockholders of any trust company under the existing law at the time of the passage or taking effect of this article."

6.—That in the course of the liquidation of the affairs of the said defendant bank, under the supervision of this Honorable Court, your petitioner has had an opportunity to ascertain the probable value of its property and the collectibility of its choses in action, and while it is impossible at this time to state the exact amount of the deficiency between the amount which will be realized in the final liquidation of the said bank, and the aggregate amount of its contracts, debts and engagements, your petitioner is in a position to state, with absolute certainty and therefore alleges, that said deficiency will be far in excess of $40,000.00, the aggregate par value of the authorized, issued and outstanding shares of the capital stock of the said corporation, that is to say, the payment in full of a sum equal to the par value of all the shares of the authorized capital stock of said bank, taken with all its other assets, will not discharge in full all of its contracts, debts and engagements, and your petitioner therefore alleges that it is necessary and proper that each stockholder of said bank be called upon to pay to your petitioner a sum equal to the par value of the share or shares of stock held by him.

Wherefore, your petitioner prays that an order may be passed determining and adjudging that each stockholder of said bank be called upon and required to pay to your petitioner a sum equal to the par value of the share or shares of stock held by him, and that your petitioner be authorized and directed to collect said sums of money and enforce payment thereof by appropriate legal proceedings.

Respectfully submitted,

JOHN J. GHINGHER,

Bank Commissioner.

Receiver for The Peoples Banking Company of Smithsburg, Maryland.

Elias B. Hartle,

Attorney for Petitioner.

STATE OF MARYLAND,

CITY OF BALTIMORE, ss:

I hereby certify that on this 17th day of June, 1933, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared John J. Ghingher, Bank Commissioner, Receiver for The Peoples Banking Company of Smithsburg, Maryland, and made oath in due form of law that the matters and facts set forth in the aforegoing petition are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

(N. P. SEAL) Winifred A. Duggan, Notary Public.

Upon the aforegoing petition and affidavit, it is this 19th day of June, A. D. 1933, adjudged, ordered and decreed by the Circuit Court for Washington County, sitting as a Court of Equity, that each stockholder of The Peoples Banking Company of Smithsburg, Maryland, be, and he is hereby required to pay to John J. Ghingher, Bank Commissioner, Receiver for the said the Peoples Banking Company of Smithsburg, Maryland, an amount of money equal to the par value of the share or shares of the capital stock of the said The Peoples Banking Company of Smithsburg, Maryland, held by him, and it is further ordered that John J. Ghingher, Bank Commissioner as Receiver for The Peoples Banking Company of Smithsburg, Maryland, be, and he is hereby authorized and empowered to collect said sums

of money and to enforce payment thereof by appropriate legal proceedings.

FRANK G. WAGAMAN.

Filed June 19th, 1933.

Leave of Court having been first had and obtained the following petition was filed February 15, 1935:

PETITION TO RESCIND ORDER OF JUNE 19, 1933, AFFIDAVIT THERETO AND ORDER OF COURT THEREON.

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| STATE OF MARYLAND<br>Vs.<br>THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND<br>A Body Corporate | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

To the Honorable, the Judges of said Court:

This, the petition of Daniel E. Bachtell, Elizabeth K. Bachtell, Keller J. Beard, Victor P. Buhrman, Frank E. Bushey, Julia Newman Chandlee, Robert L. Funk, Edgar F. Gardenhour, G. William Gardenhour, Jos. O. Gardenhour, Raymond K. Gardenhour, Anna M. Harbaugh, Edward A. Harp, Mary E. Harp, Lancelot Jacques, Jr., Margaret N. Jacques, Myrtle E. Kohler, George A. Kohler, J. Oram Leiter, Edna L. Newcomer, David H. Newman, Jr., Howard P. Newman, Mrs. Hoy D. Newman, Anna F. Oller, Betty Jane Oller, Elmer H. Oller, Susanna Oller, Franklin B. Reynolds, Carrie Ridenour, George W. Ridge, Clayton L. Rohrer, Rachel S. Schwartz, Talbott B. Smith, Benjamin F. Snyder, Bessie G. Snyder, Gehr L. Snyder, E. A. Spessard, Anna B. Stem, Isobel O. Stottlemyer, Robert F. Towson, Josiah A. Warrenfeltz, J. W. Warrenfeltz, Rev. Clarence E. Wolfe, Harry E. Wolfe, Walter A. Wolfe, Edith H. Wolfinger, Mrs. Jason P. Snively, Richard A. Snively, D. Angle Wolfinger, respectfully represents unto your Honors:

1.—That your petitioners and others have been made defendants in a cause filed in this Court on January 28, 1935, by John J. Ghingher, Bank Commissioner of the State of Maryland, Receiver for The Peoples Banking Company of Smithsburg, Maryland, being No. 12,817 Equity in the Circuit Court for Washington County, in which cause it is sought to recover alleged

statutory double liability upon stock in said banking company alleged to be held by your petitioners and others.

2.—That your petitioners thereupon consulted counsel for the defense of said equity cause and many of them then for the first time learned of the passage by this Honorable Court of the order passed and filed in this cause on June 19, 1933, requiring each stockholder in said Banking Company to pay to said Receiver "an amount of money equal to the par value of the share or shares" held by him, and authorizing said Receiver to collect said sums by appropriate legal proceedings, by virtue of which order said aforementioned equity cause was filed.

3.—That your petitioners were thereupon advised, now believe and therefore allege that under the law in force in this State said order precludes them and each of them making any defense on the merits, to said equity cause, and precludes any denial of the need for, or liability of your petitioners upon, the assessment made in said order.

4.—That neither at the time of the passage of said order nor since have any of your petitioners or any other alleged stockholders of said Banking Company been actually made parties to this cause.

5.—That no actual notice or knowledge of the passage of the aforesaid order or of the filing of the petition on which said order was passed was had by your petitioners or any of them until after the enrollment of said order.

6.—That the said petition was presented and said order passed without notice to alleged stockholders and without opportunity to your petitioners or any of them or to other alleged stockholders in said banking company to intervene and defend against the passage of said order.

7.—That the aforesaid order of June 19, 1933, was passed in this cause ex parte upon the application of the aforesaid Receiver and as of course.

8.—That said order was passed without any hearing on the merits other than consideration of said petition and the affidavit thereto. And your petitioners say that said order was passed prematurely and without proper and sufficient proof of the necessity for said order of assessment, which proof your petitioners and others have the right to require.

9.—That the passage of said order was a surprise to your petitioners and the other alleged stockholders in said banking company.

10.—That your petitioners are informed, believe and therefore allege that the various debts and liabilities of said The Peoples Banking Company of Smithsburg, Maryland, for the payment of which recovery is sought in the aforementioned equity cause accrued against said bank at various times over a period of years and that all of said debts and liabilities did not accrue during the time that all of your petitioners were alleged holders of the stock of said banking company.

11.—That said order was passed without any allegation or proof that your petitioners held stock in said The Peoples Banking Company of Smithsburg, Maryland, at the time or times when the various debts and liabilities of said banking company accrued against it.

12.—That said order was passed without any allegation or proof that the various debts and liabilities of said bank accrued during such time or times as your petitioners were alleged holders of stock of said banking company.

13.—That your petitioners are informed, believe and therefore allege that even though they should be held liable to an assessment for any payment of double liability upon the shares of stock alleged to be held by them, that your said petitioners are, if liable at all, which they do not admit, liable only, under the provisions of the banking laws of Maryland, for such debts and liabilities of said bank as accrued during the respective periods during which they may be proved to have held stock therein.

14.—That the aforesaid order renders your petitioners liable as of course as alleged stockholders of said banking company and likewise renders them, if liable at all, which your petitioners do not admit, liable for larger sums of money than they, if liable, are required by law to pay.

15.—That the Statutes of Maryland, under and by virtue of which said order of assessment was passed, impair the obligation of contracts, are discriminatory and deprive your petitioners of equal protection of the law, deprive your petitioners of property without due process of law and otherwise contravene the provisions of the Constitutions of Maryland and of the United States.

16.—That your petitioners allege that they have a bona fide, substantial and meritorious defense to the suit filed against them and others as aforesaid.

17.—That to permit said order to remain in force would be inequitable deprivation of the rights of your petitioners.

Wherefore your petitioners pray:

a.—That the order of this Court passed June 19, 1933, assessing stockholders of The Peoples Banking Company of Smithsburg, Maryland, in an amount equal to the par value of their shares of stock may be rescinded and revoked.

b.—That if prayer (a) herein be refused, that said order may be modified so as to permit persons sued as stockholders of said bank to offer any and all defenses which they or any of them may have to the payment of stockholders statutory double liability.

c.—That your petitioners may have such other and further relief as their case may require.

Respectfully submitted,

D. ANGLE WOLFINGER,
CHARLES F. WAGAMAN,
JOHN WAGAMAN,
Solicitors for Petitioners.

STATE OF MARYLAND,

WASHINGTON COUNTY, to wit:

I hereby certify that on this 16th day of February, 1935, before me, the subscriber, a Notary Public of the State of Maryland, in and for the County aforesaid, personally appeared Edgar F. Gardenhour, one of the petitioners named in the aforegoing petition, who did make oath in due form of law that the matters and facts set forth in the aforegoing petition are true to the best of his knowledge, information and belief.

In witness whereof I have hereunto subscribed my hand and affixed my notarial seal this day and year last above written.

(N. P. SEAL) Paul L. Cartee, Notary Public.

ORDER OF COURT

The aforegoing petition and affidavit having been read and considered it is thereupon this 16th day of February, — by the Circuit Court for Washington County in Equity, adjudged and ordered that John J. Ghin-

gher, Bank Commissioner, Receiver of The Peoples Banking Company of Smithsburg, Maryland, show cause on or before the 6th day of March, 1935, why the relief prayed in the aforegoing petition should not be granted, provided a copy of this order be served on the Receiver of the Peoples Banking Company of Smithsburg, Maryland or his attorney of record on or before the 19th day of February, 1935.

FRANK G. WAGAMAN.

Service of the above order admitted this 16th day of February, 1935.

ELIAS B. HARTLE,

Attorney of Record for John J. Ghingher, Receiver.
Filed Feby. 15th, 1935.

## PETITION TO INTERVENE, AFFIDAVIT THERETO AND ORDER OF COURT THEREON

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| STATE OF MARYLAND<br>Vs.<br>THE PEOPLES BANK-COMPANY OF SMITHSBURG, MARYLAND,<br>A Body Corporate | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

To the Honorable, the Judges of said Court:

This, the petition of Earl R. Bachtell, Norris O. Bachtell, Robert L. Barkdoll, Louise F. Barlow, Preston H. Beard, Lorena N. Betts, Phillip M. Bikle, Samuel B. Bowman, J. Arby Brown, Grover A. Buhrman, C. L. Burgesser, Emma E. Burgesser, J. G. Dayhoff, Anna C. Delauter, J. William Detrow, Virgie C. Detrow, Robert L. Dickey, Howard J. Fehl, N. Pearl Fiery, Catherine A. Foltz, Annie M. Frey, Joseph M. Frey, Ella C. Gardenhour, George R. Garnand, Luhn E. Harp, Lula E. Harp, Barry M. Hartle, Stanley E. Hauver, James E. Hessong, Sadie E. Hessong, Mabel N. Hoffman, Martha M. Hoffman, George B. Hoover, Roberta L. Hoover, John B. Houser, Emory Kelbaugh, Irving A. Kelbaugh, Frank H. Kretsinger, J. Rodney Kretsinger, Ernest Kuhn, C. M. Leiter, Lewis A. Longnecker, Samuel Lowman, John A. Martin, Lydia M. Martin, Martha Moser, Samuel H. Murray, I. M. Newman, Allen H. Oswald, Irene Oswald, Mary V. Reynolds, Cora Ridenour, Elmer T. Ridenour, Beulah Ridenour, Laura Ridenour, Mrs. Clara B. Ridge, Charles H. Rinehart, Edith Ingram Roh-

rer, Frances E. Schaller—Admx. B. F. Shank, Nancy M. Schmick, A. E. Sensenbaugh, Barbara Shank—Admx. B. O. Shank, Mary S. Shank, Barry G. Sheiss, Alfred Smith, Allen C. Smith, Keiffer Smith, Emma K. Stockslager, John T. Stockslager, Mary V. Toms, U. S. Toms, Mary B. Towson, John E. Waltz, J. H. Warrenfeltz, Ardie W. Winters, Keturah Winters, Sherdie E. Winters, Louisa J. Wolfe, Charles C. Wolfe, Ira L. Wolfe, Charles I. Wolfinger, John E. Wagaman, George F. Diffendal, Trustees, respectfully represents unto your Honors:

1.—That by an order of this Honorable Court passed and filed in the above entitled cause on June 19, 1933, each stockholder in The Peoples Banking Company of Smithsburg, Maryland, was ordered to pay to John J. Ghingher, Bank Commissioner of the State of Maryland, Receiver for said Bank "an amount of money equal to the par value of the share or shares" held by him and which order further authorized and directed said Receiver to collect said sums by appropriate legal proceedings.

2.—That by virtue of said order said Receiver thereupon made claim against your petitioners as stockholders of said bank.

3.—That many of your petitioners paid to said Receiver the various amounts for which it was asserted by said Receiver that were liable but your said petitioners allege and aver that said payments were made by inadvertence and mistake and allege that they have bona fide, substantial and meritorious defenses against liability asserted against them by reason of their alleged holdings of stock in said banking company.

4.—That your petitioners desire and intend to file suit to recover said payments but your petitioners are advised and therefore allege that the order of this Honorable Court passed on the 19th day of June, 1933, is final and binding upon them and is not subject to collateral attack and that said order prevents them from freely prosecuting such suit or suits and materially hampers and embarrasses them in such suits and deprives them of rights which they believe and allege they have in the premises.

5.—That heretofore, to wit, on the ____ day of February, 1935, Daniel E. Bachtell, et al, filed a petition in the above entitled cause seeking the recision or modification of the aforesaid order; that your petitioners desire to intervene in said cause and to be made parties

thereto and to seek the recision of the aforesaid order as sought in the aforementioned petition.

Wherefore, your petitioners pray that this Honorable Court may pass an order authorizing them to intervene in the above entitled cause and to make them parties thereto.

Respectfully submitted,

D. ANGLE WOLFINGER,
CHARLES F. WAGAMAN,
JOHN WAGAMAN,
Solicitors for Petitioners.

STATE OF MARYLAND,
WASHINGTON COUNTY, to wit:

I hereby certify that on this 16th day of February, 1935, before me, the subscriber, a Notary Public of the State of Maryland, in and for the County aforesaid, personally appeared Barry M. Hartle, one of the petitioners in the aforegoing petition, who made oath in due form of law that the matters and facts contained in the aforegoing petition are true to the best of his knowledge, information and belief.

In witness whereof I have hereunto subscribed my hand and affixed my notarial seal this day and year last above written.

(N. P. SEAL) Marie B. Hartman, Notary Public.

ORDER OF COURT

The aforegoing petition and affidavit thereto, having been read and considered, it is thereupon this 16th day of February, 1935, by the Circuit Court for Washington County in equity, adjudged and ordered that the petitioners in the above entitled petition be and they are hereby authorized to intervene in the above entitled cause and it is further adjudged and ordered that they be and are hereby made parties in the petition filed in said above entitled cause on the 16th day of February, 1935.

FRANK G. WAGAMAN.

Filed Feby. 15th, 1935.

## ANSWER TO PETITION TO SHOW CAUSE

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| STATE OF MARYLAND<br>Vs.<br>THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,<br>A Body Corporate | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>SITTING AS A COURT OF EQUITY |

To the Honorable, the Judges of said Court:

This, the answer of John J. Ghingher, Bank Commissioner, Receiver for The Peoples Banking Company of Smithsburg, Maryland, showing cause why the relief prayed for in a petition filed in said cause on February 15, 1935, by Daniel E. Bachtell, et al, stockholders of the defendant, should not be granted, and in compliance with the order of this Honorable Court dated February 16, 1935, respectfully shows unto your Honors:

1.—Answering the first paragraph of said petition, your respondent admits the same.

2.—Answering the second paragraph of said petition, your respondent says: That at various times between June 19, 1933, and the time of the filing of No. 12,817 Equity on January 28, 1935, the same being a suit to enforce the stockholders assessment, your respondent caused written notices to be mailed to each of the defaulting stockholders, including the petitioners, notifying them and each of them that their assessment liability on account of them being holders of stock in the defendant corporation had been imposed, and unless paid a suit would be brought for the recovery of the same.

3.—Answering the third paragraph of said petition, your respondent denies the same.

4.—Answering the fourth paragraph of said petition, your respondent says, that your respondent applied to and obtained leave of this Honorable Court, by an order dated December 26, 1934, in this cause, to file a separate suit in Equity against the petitioners and others to enforce the statutory liability of delinquent stockholders of The Peoples Banking Company of Smithsburg, Maryland, and that in pursuance thereof a suit No. 12,817 Equity in this Court was filed on January 28, 1935.

5.—Answering the fifth paragraph of said petition your respondent says, that the passage of the said order on June 19, 1933, by this Honorable Court was in the nature of an authority to your respondent to collect all assessments due on account of stockholders' liability and conferred upon him the further authority to enforce payment thereof by appropriate legal proceedings.

6.—Answering the sixth paragraph of said petition, your respondent in no way prejudiced or foreclosed any right that the petitioners had in the premises.

7.—Answering the seventh paragraph of said petition, your respondent admits the same.

8.—Answering the eighth paragraph of said petition, your respondent admits that the said order was passed on consideration of the petition and affidavit thereto, requesting the same, but your respondent denies that said order was passed prematurely and without proper and sufficient proof of the necessity for said order.

9.—Answering the ninth paragraph of said petition, your respondent denies the same.

10.—Answering the tenth paragraph of said petition, your respondent denies the same.

11.—Answering the eleventh paragraph of said petition, your respondent says, that while he admits that said order was passed without any allegation or proof that the petitioners held stock in The Peoples Banking Company of Smithsburg, Maryland, at the time or times when the various debts and liabilities of said The Peoples Banking Company of Smithsburg, Maryland, were proved against it, he denies that the passage of the order on June 19, 1933, in any manner prejudiced any rights, if any they had, of the petitioners in the premises.

12.—Answering the twelfth paragraph of said petition, your respondent says, that while he admits the allegations contained therein yet he denies that the passage of the order on June 19, 1933, in any manner prejudiced the rights, if any they had, of the petitioners in the premises.

13.—Answering the thirteenth paragraph of said petition, your respondent denies the same, and further says, that the matters therein set forth if available at all to the petitioners, can be used in their behalf in No. 12,817 Equity, now pending in this Court.

14.—Answering the fourteenth paragraph of said

petition, your respondent denies the same, and further says, that if the same are defenses to the payment of the petitioners' stock liability, that such matters are available in No. 12,817 Equity, now pending in this Court.

15.—Answering the fifteenth paragraph of said petition, your respondent denies the same.

16.—Answering the sixteenth paragraph of said petition, your respondent says, that he has no knowledge of what defenses the petitioners have to the suit filed against them and others, and can only state that the proper place to have said matters presented, would be in No. 12,817 Equity, now pending in this Court.

17.—Answering the seventeenth paragraph of said petition, your respondent says that he denies the same.

Therefore, having fully answered said petition, your respondent asks to be hence dismissed with his costs.

Respectfully submitted,

ELIAS B. HARTLE,

WILLIAM H. BOVEY,

Solicitors for John J. Ghingher, Receiver for The Peoples Banking Company of Smithsburg, Maryland

Filed March 6, 1935.

## STIPULATION

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| STATE OF MARYLAND<br>Vs.<br>THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,<br>A Body Corporate | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

### STIPULATION

It is hereby stipulated and agreed that for the purposes of the hearing on the matter of the assessment against stockholders in the above named bank and for the determination of the Court thereon the facts herein shall be taken as duly proved by the evidence on behalf of the parties to this cause whose counsel appear as parties to this stipulation.

1.—That the times at which the various stockholders of the above named bank acquired their respective share or shares of its capital stock are correctly shown by the stock books of said company, which said stock books this Honorable Court shall take and consider as having been duly offered in evidence and proved.

2.—That at the time of the closing of the aforesaid bank the various stockholders who are petitioning this Court to strike out the assessment for double liability heretofore made against them had on deposit in said bank the various sums of money shown on the lists and schedules of deposits herewith filed which said deposits shall be taken as duly proved by competent evidence in this cause.

3.—That deposits which are now liabilities of said bank and were such at the time of its closing were made and its other liabilities incurred from time to time over a period of years, and that all of its said deposits were not made or its other liabilities incurred during the time that all of its stockholders of record at the time of its closing were such.

4.—That some of the shares of stock of said bank have been held and owned continuously by the same petitioner or petitioners from before June 1st, 1910, to the present time.

ELIAS B. HARTLE,
WILLIAM H. BOVEY,
Attorneys for Receiver.
JOHN WAGAMAN,
CHARLES F. WAGAMAN,
D. ANGLE WOLFINGER,
DANIEL W. DOUB,
Attorneys for Stockholder Petitioners.

Filed July 8, 1935.

Petitioners Exhibit list of Stockholders before June 1, 1910, under Paragraph No. 4 of Stipulation.

| Stockholder | Certificate No. | No. Shares | Date Acquired |
|---|---|---|---|
| Barry M. Hartle | 3 | 40 | 4-16-10 |
| Charles C. Wolf | 5 | 20 | 4-19-10 |
| A. E. Sensenbaugh | 14 | 5 | 4-16-10 |
| Thos. F. Diffendal (dead) | 17 | 20 | 4-16-10 |
| Samuel W. Winters | 19 | 40 | 4-16-10 |
| Ardie W. Winters | 20 | 10 | 4-16-10 |

| | | | |
|---|---|---|---|
| G. Elmer Ridenour | 26 | 20 | 4- 8-10 |
| Norris O. Bachtell | 31 | 30 | 4-21-10 |
| Earl R. Bachtell | 33 | 30 | 4-21-10 |
| Barry G. Sheiss | 41 | 10 | 4-29-10 |
| Keller J. Beard | 43 | 20 | 4-29-10 |
| Jacob W. Warrenfeltz | 46 | 30 | 4-30-10 |
| George R. Garnand | 47 | 70 | 4-30-10 |

Petitioning stockholders with amounts of deposit of those having funds deposited with The Peoples Banking Company of Smithsburg.

| | deposits | | |
|---|---|---|---|
| | Checking | Savings | Xmas |
| Daniel E. Bachtell | $ 257.36 | $ | $ |
| Earl R. Bachtell | 10.09 | 2,095.16 | |
| Elizabeth K. Bachtell | | | |
| Norris O. Bachtell | 1.86 | 1,840.04 | |
| Robert L. Barkdoll | 5.35 | | |
| Louise F. Barlow | | | |
| Keller J. Beard | | | |
| Preston H. Beard | | 2,100.00 | |
| Lorena N. Betts | 110.85 | 348.83 | |
| Phillip M. Bikle | | | |
| Samuel B. Bowman | 132.81 | 510.64 | |
| Samuel B. Bowman | | 1,239.08 | |
| Samuel B. Bowman | | 4,217.06 | |
| J. Arley Brown | 5.89 | | |
| Grover A. Buhrman | | 526.13 | |
| Victor P. Buhrman | | | |
| C. L. Burgesser | 304.66 | | |
| Emma E. Burgesser | | | 15.50 |
| Emma E. Burgesser | | | 9.92 |
| Frank E. Bushey | .29 | | |
| Julia Newman Chandlee | | | |
| J. G. Dayhoff | 177.19 | 5,100.00 | |
| Anna C. Delauter | | 237.30 | |
| J. Wm. Detrow | | | |
| Virgie C. Detrow | | | |
| Robert L. Dickey | | | |
| Howard J. Fehl | 237.51 | | |
| Howard J. Fehl | 355.42 | | |
| N. Pearl Fiery | | | |
| Catherine A. Foltz | | | |
| Annie M. Frey | | 1,047.09 | |
| Jos. M. Frey | | | |
| Robert L. Funk | .55 | 25.31 | 8.70 |
| Edgar F. Gardenhour | .13 | | |
| Ella C. Gardenhour | | 1,175.25 | |
| G. Wm. Gardenhour | 5.07 | 38.11 | |

| | | | |
|---|---|---|---|
| Jos. O. Gardenhour | .02 | | |
| Raymond K. Gardenhour | 7.00 | | |
| George R. Garnand | 21.78 | 4,000.00 | |
| Anna M. Harbaugh | 17.92 | 70.00 | 47.50 |
| Edward A. Harp | | | |
| Luhn E. Harp | | | |
| Lula E. Harp | 93.94 | | |
| Mary E. Harp | 50.41 | | |
| Barry M. Hartle | 400.00 | 25.62 | |
| Stanley E. Hauver | | | |
| James E. Hessong | | 5,850.65 | |
| Sadie E. Hessong | | 1,815.63 | |
| Mabel N. Hoffman | 38.25 | 380.72 | |
| George B. Hoover | | | |
| Roberta L. Hoover | | | |
| John B. Houser | | 306.00 | |
| Lancelot Jacques, Jr. | | | |
| Margaret N. Jacques | | | |
| Emory Kelbaugh | 263.64 | 727.93 | |
| Irving A. Kelbaugh | 11.49 | 7,524.80 | |
| Myrtle E. Kohler | | 1.60 | |
| George A. Kohler | | | |
| Frank H. Kretsinger | 1,193.92 | | |
| J. Rodney Kretsinger | | 76.85 | |
| Ernset Kuhn | | 1,176.11 | |
| C. M. Leiter | 96.10 | | |
| J. Oram Leiter | | | |
| Lewis A. Longanecker | | 599.76 | |
| Samuel Lowman | | 4,755.19 | |
| John A. Martin | 340.68 | 93.93 | |
| Lydia M. Martin | 91.70 | 3,895.69 | |
| Martha Moser | | | |
| Samuel H. Murray | 301.71 | | |
| Edna L. Newcomer | 2.24 | 45.83 | |
| David H. Newman, Jr. | | | |
| Howard P. Newman | | | |
| Mrs. Hoy D. Newman | | | |
| I. M. Newman | 64.27 | | |
| Anna F. Oller | | 494.89 | |
| Betty Jane Oller | | 5.10 | |
| Elmer H. Oller ) | 79.09 | | |
| Susanna Oller ) | | 50.00 | |
| Allen H. Oswald | 4.60 | 2,649.42 | |
| Irene Oswald | | | |
| Franklin B. Reynolds | | | |
| Mary V. Reynolds | 46.01 | 1,587.61 | |
| Mary V. Reynolds | | 223.41 | 19.00 |
| Carrie Ridenour | | 29.58 | |

| | | |
|---|---|---|
| Cora Ridenour | | 263.36 |
| Elmer T. Ridenour | 83.61 | 728.28 |
| Beulah Ridenour | | 312.98 |
| Laura Ridenour | | 43.81 |
| Mrs. Clara B. Ridge ) | 23.61 | |
| George W. Ridge ) | | 286.33 |
| Chas. H. Rinehart | | |
| Clayton L. Roher | | |
| Edith Ingram Rohrer | | |
| B. F. Shank (Frances E. Schaller, Admx.) | | 923.60 |
| Rachel S. Schwartz | | |
| Talbott B. Smith | | |
| Nancy M. Schmick | | |
| A. E. Sensenbaugh | | 214.22 |
| B. O. Shank (Barbara Shank, Admx.) | | |
| Mary C. Shank | 4.71 | 3,464.94 |
| Barry G. Sheiss | | 568.69 |
| Alfred Smith | 133.33 | 5,405.59 |
| Allen C. Smith | | |
| Keiffer Smith | | |
| Benjamin F. Snyder | 5.28 | |
| Bessie G. Snyder | | |
| Gehr L. Snyder | | 145.48 |
| E. A. Spessard | 38.47 | 103.28 |
| Anna B. Stem | | |
| Emma K. Stockslager | 33.24 | |
| John F. Stockslager | 1.24 | 1,900.41 |
| Isobel O. Stottlemyer | | |
| Mary V. Toms | | |
| U. S. Toms | 9.51 | 3,023.54 |
| Mary B. Towson | | |
| Robert F. Towson | | |
| John E. Waltz | | 4,367.52 |
| J. H. Warrenfeltz | | 748.66 |
| Josiah A. Warrenfeltz | | |
| J. W. Warrenfeltz | | |
| Ardie W. Winters | .29 | |
| Keturah Winters | | 10,659.46 |
| Sherdie E. Winters | | 846.08 |
| Rev. Clarence E. Wolfe | | |
| Harry E. Wolfe | | |
| Walter A. Wolfe | | |
| Louisa J. Wolfe | | |
| Chas. C. Wolfe | 219.05 | 5,538.90 |
| Ira L. Wolf | | |
| Charles I. Wolfinger | | |
| Edith H. Wolfinger | | |

| | |
|---|---|
| D. Angle Wolfinger | |
| Mrs. Jason P. Snively | |
| Richard A. Snively | |
| Theodore A. Diffendahl | 10.57 |
| J. E. Wagaman, Trustee of | |
| Thomas F. Diffendahl | 11,679.18 |

EVIDENCE

| | |
|---|---|
| STATE OF MARYLAND<br>Vs.<br>PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

That without resort to the liabilities of stockholders the total assets of said Bank will be insufficient to pay its liabilities to the extent of at least $40,000.00 and that unless recovery is made from stockholders of this Bank, complete liquidation of its assets will leave more than $40,000.00 of its debts unsatisfied.

That subsequent to the passage of the order of assessment on June 19, 1933, the receiver upon several occasions mailed notices to the record stockholders of said bank notifying them of said assessment and calling upon them to pay the same.

That pursuant to an order of Court passed December 26, 1934, the receiver filed suit against delinquent stockholders on the 28th day of December, 1934, in No. 12,817 Equity in the Circuit Court for Washington County, Maryland.

That the last dividend was declared by said Bank about January 1, 1931, and the petitioning stockholders who were such on said date received and accepted the same.

EXHIBIT

CERTIFICATE OF INCORPORATION OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND

(copy)

This is to certify, That the subscribers, Lancelot Jacques of Smithsburg, Maryland, Jos. H. Sleasman, of Smithsburg, Maryland, Leslie C. Marsten, of Smithsburg, Maryland, David J. Reecher, of Smithsburg, Mary-

land, George B. Hoover, of Smithsburg, Maryland, Boaz Gardenhour, of Smithsburg, Maryland, Geo. R. Garnand, Smithsburg, Maryland, Allen C. Smith, of Smithsburg, Maryland, Barry M. Hartle, Chewsville, Maryland, Henry C. Wolf, Chewsville, Maryland, Keller J. Beard, Smithsburg, Maryland, F. H. Bikle, Smithsburg, Maryland, James G. Dayhoff, Smithsburg, Maryland, George F. Diffendall, Smithsburg, Maryland, and George M. Bushey, Cavetown, Maryland, and all being of full legal age, and all of whom are citizens of the State of Maryland, do hereby associate themselves with the intention of forming a corporation for the purpose of conducting a Savings Bank and to enjoy the powers and immunities of a corporation or body politic, under and in pursuance of the General Laws of the State of Maryland, authorizing the formation of such corporation, do hereby enter into and adopt the following as their certificate of incorporation.

Article 1.—The Corporate name of the corporation shall be The Peoples Banking Company of Smithsburg, Maryland.

Article 2.—The object and purpose for which incorporation is sought is to have and maintain a Savings Institution, authorized and empowered to borrow money, receive money on deposit and pay interest thereon, to loan money or to discount in accordance with bank usage taking such security therefor, either real or personal, as the Board of Directors of said corporation may deem sufficient; to buy and sell bills of exchange, notes, bonds or other securities; to make such special regulations in reference to special or other deposit as the Board of Directors may think advisable; to declare such dividends to the general depositors and the payment of such interest to special depositors as said Directors may, from time to time, deem expedient, and in general to transact such business as is set out by the terms and conditions in these Articles of Incorporation and in the by-laws of said corporation which may be hereafter adopted, subject to all the conditions, provisions, relations and powers contained in the Public General Laws of Maryland, applicable to a corporation of this charter or the amendments thereto which may hereinafter be enacted.

Article 3.—The principal office of said Corporation in this State will be located at Smithsburg, Washington County, Maryland.

Article 4.—The total amount of capital stock of this

corporation so formed shall be Twenty Thousand Dollars ($20,000.00) and that the said capital stock is divided into 2,000 shares of the par value of Ten Dollars ($10.00) each.

Article 5.—The concerns of said Corporation shall be managed by a Board of Directors composed of fifteen members, and that Lancelot Jacques, Joseph H. Sleasman, Leslie C. Marsten, David J. Reecher, Geo. B. Hoover, Boaz Gardenhour, Geo. R. Garnand, Allen C. Smith, Keller J. Beard, Ferdinand H. Bikle, James G. Dayhoff, and George F. Diffendall, all of Smithsburg, Maryland, Geo. M. Bushey of Cavetown, Maryland and Barry M. Hartle and Henry C. Wolf, of Chewsville, Maryland, all of whom are citizens of the State of Maryland, and actually reside therein shall act as such Directors for the first year or until their successors are duly chosen and qualified, and that such corporation may, at any annual election — the number of its Directors to any number not greater than eighteen.

In testimony whereof, we have hereunto set our hands and affixed our seals this 22nd day of January, A. D., 1910.

| | |
|---|---|
| ALLEN C. SMITH | (SEAL) |
| BARRY M. HARTLE | (SEAL) |
| HENRY C. WOLF | (SEAL) |
| KELLER J. BEARD | (SEAL) |
| F. H. BIKLE | (SEAL) |
| JAS. G. DAYHOFF | (SEAL) |
| GEO. F. DIFFENDALL | (SEAL) |
| LANCELOT JACQUES | (SEAL) |
| JOS. H. SLEASMAN | (SEAL) |
| LESLIE C. MARSTEN | (SEAL) |
| DAVID J. REECHER | (SEAL) |
| GEORGE B. HOOVER | (SEAL) |
| BOAZ GARDENHOUR | (SEAL) |
| GEO. R. GARNAND | (SEAL) |
| G. M. BUSHEY | (SEAL) |

Test: J. H. Ferguson

STATE OF MARYLAND,

WASHINGTON COUNTY, to wit:

I hereby certify that on this 22nd day of January, A. D. 1910, before me, the subscriber, a Justice of the Peace of the State of Maryland, in and for Washington County, personally appeared Lancelot Jacques, Joseph H. Sleasman, Leslie C. Marsten, Daniel J. Reecher, Geo. B. Hoover, Boaz Gardenhour, Geo. R. Garnand, Allen

C. Smith, Barry M. Hartle, Henry C. Wolf, Keller J. Beard, F. H. Bikle, James G. Dayhoff, Geo. F. Diffendall and Geo. M. Bushey; all residents of the State of Maryland, and did each on their respective part acknowledge the above and aforegoing certificate of incorporation to be their respective act.

J. H. Ferguson, J. P.

STATE OF MARYLAND,

WASHINGTON COUNTY, to wit:

I, Edward Oswald, Clerk of the Circuit Court for Washington County, do hereby certify that J. H. Ferguson, Esquire, before whom the above and annexed acknowledgments were made, and who hath thereunto subscribed his name was at the time of so doing, a Justice of the Peace of the State of Maryland, in and for Washington County, duly appointed, commissioned and sworn, and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the hand-writing of the said Justice and verily believe the signature thereto is his genuine signature.

In testimony whereof I hereunto subscribe my name and affix the seal of the Circuit Court for Washington County aforesaid, at Hagerstown, this 24th day of January, A. D. 1910.

(COURT SEAL) EDWARD OSWALD, Clerk.

I, Martin L. Keedy, one of the Judges of the Fourth Judicial Circuit of the State of Maryland, in which is located the town of Smithsburg, in the County of Washington, do hereby certify that the above and aforegoing certificate of incorporation has been submitted to me for examination and I do further certify that said certificate is executed in conformity with the law.

January 24th, 1910. M. L. KEEDY.

STATE OF MARYLAND,

WASHINGTON COUNTY, to wit:

I hereby certify that the aforegoing is a true copy taken from Liber No. 2, folio 137, one of the Charter Records for Washington County, the same having been recorded February 3, 1910.

In testimony whereof I hereunto subscribe my hand and affix the seal of the Circuit Court for Washington

County at Hagerstown, this 26th day of May, A. D. 1933.

(SEAL)

EDWARD OSWALD,
Clerk of the Circuit Court for Washington County, Maryland.

Filed June 19, 1933.

## EXHIBIT

## CERTIFIED COPY OF AMENDMENT TO CHARTER OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND

### ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF THE PEOPLES BANKING COMPANY

THIS IS TO CERTIFY That at a meeting of the Board of Directors of The Peoples Banking Company of Smithsburg, Md., held on the 24th day of Dec., 1921, at which more than a majority of the said Board was present, a motion was duly made, seconded and unanimously carried, that the Board of Directors of The Peoples Banking Co. of Smithsburg, Md., recommend to the stockholders of the Corporation that the capital stock of the Corporation be increased from Twenty thousand ($20,000.00) Dollars to Forty Thousand, and that the certificate of incorporation of the Corporation be amended to effect that result, and that a special meeting of the stockholders of the Corporation be called for the purpose of considering such recommendation of the Board, and taking such action thereon as may be deemed proper in the premises.

That pursuant to a notice of a special meeting of the stockholders, sent to all of the stockholders of the Corporation in pursuance of the aforementioned action of the Board of Directors, and setting forth the object of the meeting, as well as the time and place thereof, and giving the period of notice required by law in the premises, a meeting of the stockholders of The Peoples Banking Company of Smithsburg, Md., was duly held on the 7th day of Jan., 1922, at which the holders of more than two-thirds of the stock of the Corporation outstanding and entitled to vote were present; that at said meeting the aforementioned recommendation of the Board of Directors was duly read to the stockholders, and by them considered; that thereupon, upon motion duly made, seconded and unanimously carried, it

was resolved that the section of the Articles of Incorporation of The Peoples Banking Co., as follows:

"Section The total amount of the capital stock of said Bank is $20,000.00 divided into 2,000 of the par value of ($10.00) Dollars each" be and the same is hereby changed to read as follows:

"Section The total amount of the capital stock of said Bank is $40,000.00 divided into 4,000 of the par value of $10.00 Dollars each."

The price to be paid for the new stock is ($25.00) Dollars per share that at said meeting of stockholders of The Peoples Banking Co. it was further resolved that a certificate be executed by the proper officers of the corporation, as is hereby done, setting forth the said Amendment of the Articles of Incorporation of the Corporation, and that such further action to be taken in the premises by the proper officers of the Corporation as may be requisite to render the said Amendment effectual.

In witness whereof The President and Cashier of The Peoples Banking Co., have hereunto affixed their signatures this 9th day of Jan., 1922, and certify that the foregoing resolutions were passed as above set forth and the said President and Cashier have further acknowledged this Certificate of Amendment for and on behalf of the said Corporation.

LANCELOT JACQUES, SR.,
President of The Peoples Banking Co. of Smithsburg, Maryland.

(CORP. SEAL)

P. O. COX,
Cashier of The Peoples Banking Co., Smithsburg, Maryland.

STATE OF MARYLAND,

COUNTY OF WASHINGTON, SS:

I hereby certify that on this 9th day of Jan., 1922, before me the subscriber, a Notary Public of the State of Maryland, in and for Washington County, personally appeared Lancelot Jacques, Sr., President of The Peoples Banking Co., and P. O. Cox, Cashier of the said Bank, and on behalf of The Peoples Banking Co., each acknowledged the foregoing Certificate of Amendment as the act and deed of said Corporation.

Witness my hand and notarial seal.

(N. P. SEAL) Keller J. Beard, Notary Public.

CERTIFICATE OF APPROVAL OF BANK COMMISSIONER

I do hereby approve the aforegoing Certificate of Amendment to the Articles of Incorporation of The Peoples Banking Co.,

As witness my hand this tenth day of January, 1922.

George W. Page,
Bank Commissioner of the State of Maryland

I, Frank G. Wagaman, one of the Judges of the Circuit Court of Washington County, do hereby certify that the foregoing certificate has been submitted to me for examination and I do further certify that the said certificate is executed in conformity with the law.

Jany. 13, 1922 Frank G. Wagaman, Judge.

STATE OF MARYLAND,

WASHINGTON COUNTY, to wit:

I hereby certify that the aforegoing is a true copy taken from Liber No. 3, folio 30, one of the Charter Records of Washington County, the same having been recorded Jany. 13, 1922.

In testimony whereof I hereunto subscribe my hand and affix the seal of the Circuit Court for Washington County at Hagerstown, this 15th day of June, A. D. 1933.

(SEAL) Edward Oswald,
Clerk of the Circuit Court for Wash. Co., Md.

Filed June 19, 1933.

OPINION

| | |
|---|---|
| STATE OF MARYLAND Vs. THE PEOPLES BANKING COMPANY OF SMITHSBURG | NO. 12,277 EQUITY IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

On the 5th day of April, 1933, the Bank Commissioner was appointed Receiver of The Peoples Banking Company of Smithsburg, hereinafter called Bank, and its affairs are now in the hands of the said commissioner for the purpose of liquidation.

On June 19, 1933, this Court passed an order and decree requiring "each stockholder of The Peoples Banking Company of Smithsburg, Maryland, to pay

to John J. Ghingher, Bank Commissioner, Receiver for the said "Bank" an amount of money equal to the par value of the share or shares of the capital stock of the said "Bank" held by him, and further ordering and authorizing the Bank Commissioner to proceed by law with the collection of the assessment so made.

On Feb. 15, 1935, a large number of persons who were stockholders of the Bank at the time of the appointment of a Receiver filed their petition praying that they be made parties defendant in the said proceedings. The prayer of this petition was granted. On the same day these new parties defendant filed their petition praying that the said order of June 19, 1933, be rescinded and revoked. The allegations of this petition and the answer of the Bank Commissioner thereto, raise the question of the constitutionality of Sec. 72 of Art. 11 of the Annotated Code, and if it be held constitutional, its proper construction and effect.

The more material facts appearing from the testimony and stipulation filed in the case are as follows:

The Bank was incorporated under the general provisions of the law on the 24th day of February, 1910. Many of the petitioners were creditors of the Bank at the time of the appointment of the Receiver, as well as stockholders. Thirteen of these stockholders were such prior to June 1, 1910, the effective date of the Act of Assembly now appearing in the Code as above stated.

The liability of a stockholder of a corporation to be called upon to pay the debts of the corporation is a liability founded upon contract.

Norris vs. Wrenschall 34 Md. 499.
Brant vs. Echlen, 59 Md. 351
Coulbourn vs. Boulton 100 Md. 351.
Steel Co. vs. Equitable Soc. 113 Md. 80.
Colton vs. Mayer 90 Md. 711.
Republic Iron & Steel Co. vs. Carlton
189 Fed. 130.

In Norris vs. Wrenschall, supra, page 500, it is said in an opinion by Judge Miller, that the stockholder's liability "is not in the nature of a penalty, like that in other sections, imposed upon the trustees, managers, directors or other officers of the corporation, for doing that which the statute expressly or by implication forbids, or omission to do something which the law directs to be done § § it is § § virtually and in effect a liability

upon a contract and the mutual agreement of the parties, not indeed in form an expressed personal contract, but an agreement of equally binding obligation consequent upon, and resulting from, the acts and admissions or implied assent of the parties". Or, as said by Judge Rose in Republic Iron & Steel Co. vs. Carlton, supra, "In Maryland the liability of a stockholder to a creditor of a corporation is one founded on contract §§ it follows that the plaintiff has a right to insist that the obligation of that contract shall not be impaired by subsequent legislation, nor may the State so change the remedy as substantially to impair or lessen the value of the contract".

Since the right of a creditor and the liability of a stockholder is founded on contract, and the contract is a creature either of the Constitution of the State or the valid statutes passed by the Legislature in pursuance of and in accordance with the Legislature's constitutional powers, it is necessary to examine first the constitutional provisions.

Sec. 39 of Art. 3 of the Constitution is as follows:

"The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise: the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by law".

Since the adoption of the Constitution of 1867, there have been but two general statutes dealing with the subject matter of Art. 3 Sec. 39. The first was Sec. 11 of Chap. 206 of the Acts of 1870, appearing in the Code of 1888 as Sec. 27 of Art. 11. The second was Sec. 68 of Chap. 219 of the Acts of 1910, appearing in the present Code as Sec. 72 of Art. 11.

The Act of 1870, Chap. 206, Sec. 11, is as follows:

"The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this article and every part of it may be al-

tered from time to time, or repealed, by the Legislature."

This Act is in the identical language of Sec. 39 of Art. 3 of the Constitution, except that it includes the directors as well as the stockholders.

Chapter 338 of the Acts of 1852 authorized the formation of corporations for manufacturing purposes. Sec. 9 of that Act provided, "That all stockholders of every company incorporated under this Act shall be severally and individually liable to the creditors of the Company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company", until the whole amount of capital stock is paid in. In Matthews vs. Albert, 24 Md. 527, the creditor of a manufacturing company sought to recover from a stockholder the double liability under the section quoted. It was held that the stockholder was liable for the debt of the corporation while he was a stockholder, but was not liable to a creditor who became such after his stock had been transferred. This case was decided in 1866.

In Norris vs. Wrenschall, 34 Md. 492, a creditor of a manufacturing corporation sought to recover against a stockholder the double liability under Sec. 52 of Art. 26 of the Code of 1860, being the same statutory provision under consideration in the last mentioned case. The Court said: "We have also there (Norris vs. Johnson, ante, page 485) determined that the extent of the liability of each stockholder is measured by the amount of stock held by him at the time the debt was contracted, continues at least until all the capital stock is paid in, and is in no wise affected by the amount thereof that may at any time remain unpaid. There is no provision in the Code by which this liability is made dependent upon any other contingency than the contracting of the debts by the corporation, whilst the defendant was a stockholder, and before the capital stock is fully paid up. These two conditions make the liability determinate and irrevocable."

Hager vs. Cleveland, 36 Md. 476, was the same character of case as the one last mentioned. The Court says: "This brings us to the second ground of defence; whether the transfer of stock by the appellant, exonerates him from personal liability for a debt contracted when he was a stockholder and before the whole capital stock was paid in".

"The language of Sec. 52, it must be admitted, is

general in its terms, and does not in words declare whether the individual liability shall attach to such as are stockholders at the time the debt is contracted, or to those holding stock at the time the suit was brought. It is obvious, however, that the protection of the creditor was the paramount object the Legislature had in view, and the section in question, ought to receive such a construction as will best accomplish this object." The Court later quoting from Norris vs. Wrenschall, supra, says: "It is a debt under the statute due from the stockholder to the creditor, springing out of and co-existent with the contract between the corporation and the creditor," (Colton vs. Mayer 90 Md. 717), and then says: "If so, if it be a debt due from the stockholder to the creditor coexistent with the contract by the company, it is clear that no act by the stockholder without the consent of the creditor can exonerate him from the liability thus incurred. The relation of stockholder creates a perfect legal obligation to pay the debts contracted by the company, and it is upon the faith of this perfect legal obligation that parties deal with the company. The liability of the stockholder, being therefore, in the nature of a contract made between the company, the creditor and himself, we are of opinion that it continues and **is in no manner affected by the mere transfer of his stock.** (Bold face ours). This construction is fully warranted by the language of the statute and best accomplishes the purpose of the Legislature, namely, the protection and security of creditors."

In Weber vs. Fickey, 47 Md. 196, the Court was construing the liability of a stockholder under Sec. 59 of Chap. 325 of the Acts of 1872, the statute being similar to the one in the aforegoing cases. In passing upon a demurrer to the declaration in a suit at law the Court says: "Another defect in the declaration is the omission to allege that the defendant was a stockholder at the time the debt sued for was contracted. It is not sufficient that he should have become one afterwards or was so, at some time prior to the date of the credit given, he must have been a stockholder at the time, Hager vs. Cleveland, 36 Md. 476, and this is as essential to the right of recovery against him as the fact that there is an amount of his subscription still unpaid. It is as necessary to aver the one as the other, and the omission of either averment from the declaration is a fatal defect."

In Hammond vs. Straus, 53 Md. the Court had under consideration the liability of a stockholder of a

banking corporation to a creditor of the bank. The provisions of the charter of the bank with respect to this liability are contained in Sec. 14 of Chap. 118 of the Acts of 1874, and are identical in language with the constitutional provisions heretofore referred to, with the addition of "directors" to "stockholders", and with the Act of 1870, Chapter 206, Section 11, heretofore referred to. The Court announced, "To entitle the plaintiff (creditor) to recover in this action it was essential that three things should be made to appear: 1. That a corporation, such as that alleged should have been created; 2. That the defendant was a stockholder therein; and 3. That the plaintiff was a creditor of the corporation and that he became such while the defendant was a stockholder and Judge Boyd said in Murphy vs. Wheatley, 102 Md. 501, 517,

"If depositors and other creditors become such before stockholders occupying that relation to the company they cannot say that they relied on those persons for additional security, or had any right to look to them, for they were not then, and might never become stockholders. But under the rule adopted by this Court, they can if they choose ascertain who the stockholders are when the debts are contracted."

In Colton vs. Mayer, 90 Md. 711, the Court considered the rights of creditors and the liabilities of stockholders under the provisions contained in the Charter of the South Baltimore Bank. This suit was by receivers against a stockholder. The charter fixed the rights of the creditor and the obligations of the stockholder in the identical language of the constitution, except that it added "directors", to the stockholders. The Court reaffirmed Hammond vs. Straus, supra, and went on to say: "In as much as this charter does not authorize the receivers to sue, the test of their right to do so is to ascertain whether it gave the corporation any property or estate in this liability of the stockholders, or in any manner made it an asset of the bank, for, unless it did, it is clear that they cannot maintain this suit against the defendant on the mere ground that he was a stockholder. When the charter says, that the stockholders and directors of this corporation shall be liable to the amount of their respective shares of stock 'for all of its debts and liabilities' to whom were they to be so liable? Clearly not to the corporation for its own debts and liabilities, but manifestly they were to be liable to the creditors". And the Court further says: "There was no liability of any kind to the corporation,

by reason of this provision in the charter, and at no time from its organization to its dissolution could it have demanded one penny from the appellee on account of it."

Murphy vs. Wheatley, 102 Md. 501, was a suit to enforce the triple liability of stockholders in a trust company under Section 85L of Article 23 of the Code, Act of 1892, Chapter 109, and it was there held that a stockholder was not liable to a creditor who became such before the ownership of the stock, a liability denied by the Circuit Court. In that case the opinion by Judge Boyd says: "We are aware that many courts—perhaps a majority of those in this Country—have held to the contrary, but the decisions of this Court unquestionably sustain that answer of the lower Court. It is to be regretted if this construction of the statute will cause such difficulties as are suggested by the appellants (of accounting, collection and apportionment), but even such results would be preferable to the risk of doing manifest injustice to those who become stockholders during the closing days of this company." And on page 518, it is said, "The liability, in this respect, is well settled in the State in the earlier cases. They held that the extent of the liability was measured by the amount of stock held by the stockholders **at the times the debts were contracted,** and stockholders were not liable for debts contracted **before** they became such." If this is not the law now, then the stockholders' liability is a penalty and is not contractual. To hold that this liability is a penalty for owning stock the day a bank closes would be not only to overrule the decisions, but to repudiate the interpretation given the constitutional provision (Art. 3, Sec. 39) by Judge Alvey in Hammond vs. Straus, 53 Md. 1 and by Judge Boyd in Colton vs. Mayer, 90 Md. 711.

The cases from which we have quoted, and to which we have referred, firmly establish the principle upon which stockholders are held liable to creditors in Maryland. Some of these cases have considered statutes wherein the language was similar to the language of the Constitution. Others have considered language identical with the language of the Constitution. One of them was decided before the adoption of the Constitution. None of these cases has ever been overruled, nor its authority questioned. From them we think it clearly decided that Sec. 39 of Art. 3 of the Constitution requires the Legislature to give to creditors of Banks, and to impose upon stockholders of banks, the

following rights and obligations respectively. First: To give to creditors and impose upon stockholders direct and immediate responsibility to be enforced between themselves. Second: To give the creditor the right to pursue a stockholder, and to place upon the stockholder a liability, for the debts of the bank incurred while the stockholder was such. Third: The right of the creditor and the responsibility of the stockholder to continue, notwithstanding the stockholder transfers his stock. And fourth: The liability of the stockholder to be an asset of the creditor and not an asset of the corporation. It does not require the Legislature to impose liability on a stockholder for any debts except those attaching while the stockholder is such.

These rights of creditors against stockholders, which the Constitution requires the Legislature to give them, are property. If these rights are property it is not within the power of the Legislature to take them away. As stated in Mister vs. Thomas, 122 Md. 445-457, "It is not, therefore, within the power of the Legislature to have exempted the stockholders of such a corporation from the obligations imposed by Section 39 of Art. 3 of the Constitution." This liability, in order to be unassailable, must be a property right, and if so available to creditors against stockholders who were such when the debt was created. If this is not true then the only alternative is to declare it to be a penalty. If a penalty the stockholder, if he sees a bank's failure ahead may rid himself of stock in any way he chooses, no matter what his motive may be, and he can thus free himself of liability. If the transfer be in fraud of any one's right, it must be a property right. There can be no fraud in ridding onesself of a penalty.

It is in the light of these principles, and in that light alone, that we are bound to approach the consideration of Section 72 of Article 11 of the Code.

There is no prohibition in the Constitution against giving creditors of banks rights or imposing upon stockholders obligations greater than required by the Constitution. Murphy vs. Wheatley, supra. But, when we come to consider the only other Act relating to the rights of creditors against stockholders of banks, to wit, Section 72 of Article 11 of the Code, we are bound to assume the Legislature intended to obey the Constitutional Mandate to it; for it would ill become the Court to charge a coordinate branch of the State Government with a wilful disobedience of the will of the

people as expressed in the fundamental law. If, therefore, Section 72 of Article 11 of the Code is found to give to creditors the rights, and to impose upon stockholders the liabilities required by the Constitution, it will be no objection to find that it gives greater rights to creditors and imposes greater liabilities upon stockholders. However, if the Section of the Code under consideration is found to give only one right to creditors and impose one liability upon stockholders, then, if by any reasonably possible construction the Act can be held to comply with the Constitutional Mandate, it must be so held. And if the section in question is found to undertake to deny creditors the rights guaranteed to them by the Constitution, it must be held to contravene Section 10 of Article 1 of the Federal Constitution, as well as the Fourteenth Amendment thereto, and in addition thereto the 23rd Article of our own Bill of Rights. Md. Jockey Club vs. State 106 Md. 413—Hawthorne vs. Calef 2 Wall 10-21.

Section 72 of Article 11 of the Code purports to provide but one fund for the benefit of creditors of banks. It purports to impose but one obligation upon stockholders. We think its provisions can reasonably be construed as complying with the provisions of the Constitution. Any other construction would mean that every State bank organized under the general law would be unlawfully operating because of the absence of the requirement of Article 3, Section 39 of the Constitution. That provision must be fastened on every bank chartered by this State.

The Constitution provides that stockholders shall be liable for "all debts, etc." The Act of 1870 used the same language. The charter in Hammond vs. Straus, supra, repeated it. The statute in Murphy vs. Wheatley, supra, also repeated it. The Charter in Colton vs. Mayer, supra, did likewise. These cases determined that the liability for "all debts, etc." meant debts attaching at the time the stockholders were such irrespective of any subsequent transfer of the stock. When, therefore, the Legislature in 1910 in the section under consideration again repeated the identical language "all debts, etc." which had been given a very definite meaning by the cases referred to, it must be held to have intended the meaning already given it, unless a different meaning is forced by a different context. There is nothing in the Section of the Code under consideration that compels a different interpretation of the language. The "debts" to be benefited by the liability imposed under

all the cases were not the debts which might be owing upon the insolvency of the bank. As to each stockholder they were the "debts" attaching during the time he was such.

The "stockholders" to be liable were designated in the charters in the cases cited, as well as in the constitutional provision, by the same language as they are designated in Section 72 of Article 11. The Legislature therefore must have meant the same class of individuals as was determined to be included within that description in the language used in the cases. And "stockholders" as defined in the section must therefore be held to be the stockholders at the time of the creation of the debt for which the liability is sought to be enforced, irrespective of the transfer of their stock.

Not only is there no indication in this section that it was intended to make liable only stockholders of record at the time of the insolvency of the bank, but it affirmatively appears by the repetition of the language already interpreted as intended not to do so.

Beginning with the Act of 1892, Chapter 109, there are many statutes fixing the liabilities of stockholders of trust, guaranty and other corporations, as to which the Constitution contains no provision. In every one of those Acts the rights of preexisting creditors are reserved. Likewise in Section 72 of Article 11, the preexisting rights of creditors of trust companies are reserved. As to creditors of banks there is no such reservation. As to banks the only previous statute was the Act of 1870, which, as has been said, was in the language of the Constitution. From this failure in the Act of 1910 to reserve the preexisting rights of creditors of banks, the only logical conclusion is that the Legislature did not, by that statute, intend to make any change in those rights; but intended only to provide a different procedure for their enforcement. This view further confirms us in our conclusion that the rights of creditors of banks under the Act of 1910 are identical with those rights under the Act of 1870, and that the Act of 1910 was intended by the Legislature to be construed exactly as was the Act of 1870, except so far as the Act of 1910 provides a different method of procedure.

Section 72 of Article 11 of the Code provides that the liability of stockholders shall be an "asset of the corporation". If by that language it is meant that this liability is for the benefit of all the creditors of the cor-

poration, irrespective of the views we have heretofore expressed, then, in our view, it would be in violation of the Constitutional rights of creditors of the bank. If, on the other hand, it is held to mean that the liability of the stockholder is an asset of the corporation to be distributed by it or its receiver to the creditors according to their rights as heretofore defined, and we so construe it, then it merely provides for a more equitable distribution of the liability imposed for the benefit of creditors, and prevents multiplicity of suits among stockholders for contribution. This construction does no violence to the rights of creditors and the statute thus construed is not rendered inconsistent with our State or Federal Constitutions.

Miners & Merchants Bank vs. Snyder 100 Md. 57

Mister vs. Thomas, 122 Md. was decided after the Act of 1910, but the receivers who brought the suit were appointed in 1907. The Farmers Trust, Banking and Deposit Co. for whom the receivers were appointed, were subject to the provisions of the Act of 1904, which was an amendment to Chapters 192 and 270 of Act of 1892, by which the stockholders were bound by Section 11 of the Charter. The order of the lower Court directed the receivers to bring suit against stockholders "who would in any way be liable for the debt of the said company". There was nothing in this order limiting the liability to stockholders of record of the day of the receivership, from which it might be inferred that the Chancellor contemplated the possible liability of former stockholders. Nor did the Court of Appeals in the opinion by Judge Burke in terms say it was an asset of the corporation. What he did say (p 458) was, that it was "to be treated as an asset of the corporation and enforced by the receivers under the order of that Court". The views we have herein before stated are therefore in no way inconsistent with this case.

We have hereinbefore stated that the liability of a stockholder of a bank is an "asset of the corporation" only in the sense that it may be collected by the receiver for the benefit of those creditors who became such while the stockholders against whom the liability is enforced, were such. In so determining we found that Section 72 of Article 11 of the Code, was intended to be a performance by the Legislature of the Constitutional Mandate and no more. It follows as a necessary result that stockholders who are also creditors are equitably entitled to set-off the debt of the bank to

them against the stockholders' liability. Such a ruling is necessary to sustain the constitutionality of the statute, and is a reasonable construction of it.

In Cahill vs. Original Big Gun Asso. 94 Md. 353, the Court allowed the set-off because the charter considered in that case required it. The pertinent provisions of the charter are in the identical language of the Constitution except that "directors" is added to stockholders against which liability is imposed. The Charter considered is the one, the effect of which was construed in Colton vs. Mayer, supra. Strauss vs. Denny, 95 Md. 690 reaffrmed this decision.

In the discussion of this case we are not unmindful of two recent cases in the Court of Appeals holding stockholders liable to assessment, but neither of them says what stockholders are liable, nor for the benefit of what creditors was there such liability. Those cases were heard and decided on the theory of liability, and the constitutional provision was not under attack.

In the case of Lange vs. Ghingher, 168 Md.—178A 116, the question presented and decided was whether the stockholders of the American Trust Company were relieved of their statutory liability because of an agreement whereby management of the bank had been taken over by another bank, with other banks agreeing to share in any shortage in the liquidation of the insolvent bank.

In the case of Robinson vs. Hospelhorn, 168 Md.—, Daily Record June 27, 1935, the decision was that the stockholders' liability was primary, and that the assessment of the stockholders' liability did not need to await the liquidation of the bank's assets and that the assessment was not required to be delayed until the liquidation of the bank's assets by a liquidating corporation to which the assets of the bank had been transferred under an assignment by which it had until July 1, 1938 to convert such assets. These were the only questions submitted, argued and decided in that case. The questions submitted were so limited by the following stipulation in the record of that case:

"It is intended that all other questions, including the questions of insolvency, vel non, and the extent thereof, the status of subscribers to the guaranty fund, and the question as to the liability of particular stockholders for debts created before they became such, or after the bank passed into the control of the Bank Commis-

sioner, and all other relevant questions are reserved for the future determination of the Court, as being unnecessary for present decision".

The fact that it has been the practice under the National Banking Act (U. S. Rev. St. Sec. 5151) to impose this liability upon all stockholders of record of the date of the receivership is neither precedent nor authority in this state. The Constitution of the United States is silent on the subject, and the statute is merely a banking regulation. In 7 C. J. 769 Sec. 607, it is said; "This liability is created for the sole benefit of creditors, and is held to arise purely by force of statute and not to be contractual in its nature". In this State the very existence of a bank is contingent upon its being subject to a stockholder's liability in addition to the payment for the stock, and this liability has been declared in all of the cases cited to be contractual in its nature and enforceable in the manner provided. It is not an arbitrary exercise of power by the Legislature, but a contractual obligation, which is a condition precedent to the conduct of a banking business by a corporation. Plaintiff's counsel have cited numerous cases to the effect that this is an arbitrary power in the Legislature, and that the liability is in the nature of a special or trust fund for the security of creditors generally. Our decisions are upon the theory, and they have so construed the language of our Constitution, (Hammond vs. Straus, supra, and Colton vs. Mayer, supra), that there is individual responsibility of the stockholder to the creditor who became such during such individual stockholding, and that this liability is not ended by the transfer of his stock, and this is in line with the last clause of the constitutional provision which reads, "The books, papers and accounts of all banks shall be open to inspection, under such regulations as may be prescribed by law", and with what was said by Judge Boyd, already quoted, from Murphy vs. Wheatley, supra.

All irregularities, if any, as to the time and method of presenting to the Court the matters herein considered were waived by the solicitors for the respective parties, and the questions submitted on their merits.

The order and decree of June 19, 1933, will be rescinded and revoked.

D. Lindley Sloan,
Frank G. Wagaman.

Filed July 27, 1935.

# DECREE

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| STATE OF MARYLAND<br>VS.<br>THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

## DECREE

The matter of the petition of the stockholders of the above named Bank heretofore filed in this cause on February 15, 1935, praying revocation of the order hereinafter referred to, the answer of the Bank Commissioner, Receiver of said Bank, thereto, the evidence, stipulations and all other matters herein referring to the liability of the stockholders of said Bank for the debts thereof having been read and considered, and counsel for the respective parties having been heard, it is thereupon this 31st day of July A. D., 1935, by the Circuit Court for Washington County, pursuant to and in conformity with the opinion heretofore filed in this cause on the 27th day of July, A. D., 1935, adjudged, ordered and decreed that the order that this Court heretofore passed and filed herein on the 19th day of June, A. D., 1933, decreeing that each stockholder of The Peoples Banking Company of Smithsburg pay to John J. Ghingher, Bank Commissioner, Receiver for The Peoples Banking Company of Smithsburg an amount of money equal to the par value of the share or shares of the capital stock of The Peoples Banking Company of Smithsburg held by him and authorizing and empowering said Bank Commissioner to collect the same by appropriate legal proceedings, be and the same is hereby revoked and rescinded, without prejudice to such further proceedings as the receiver may be advised are proper and in accordance with the opinion heretofore filed.

D. Lindley Sloan,

Frank G. Wagaman.

Filed July 31st, 1935.

Leave of Court having been first had and obtained, the following Order for appeal was filed.

## ORDER FOR APPEAL

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| STATE OF MARYLAND<br>Vs.<br>THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,<br>A Body Corporate | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

Mr. Edward Oswald, Clerk:

Please enter an appeal to the Court of Appeals of Maryland from the final decree in this cause dated the 31st day of July, A. D., 1935, revoking and rescinding the Order passed on the 19th day of June, A. D., 1933, in the above entitled cause, which said order had decreed that each stockholder of The Peoples Banking Company of Smithsburg, Maryland; a body Corporate, pay to John J. Ghingher, Bank Commissioner, Receiver, an amount of money equal to the par value of the stock held in said Bank and had further authorized and empowered said Bank Commissioner to collect the same by appropriate legal proceedings.

Elias B. Hartle,
William H. Bovey,
Counsel for Receiver.

Filed August 7th, 1935.

## DOCKET ENTRIES

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| STATE OF MARYLAND<br>VS.<br>PEOPLES BANKING COMPANY OF SMITHSBURG,<br>A Body Corporate | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

Bill in Equity for a receiver and affidavit filed April 5, 1933, and Exhibit A filed April 24, 1933.

Answer and demurrer of The Peoples Banking Company filed April 15, 1933.

Amended answer to Bill of Complaint filed May 4, 1933.

Decree passed and filed May 5, 1933 appointing John J. Ghingher, Bank Commissioner of Maryland, Receiver.

Bond filed and approved May 5, 1933.

Petition and two exhibits and order of Court thereon determining stockholders' liability and authorizing receiver to collect and enforce payment thereof filed June 19, 1933.

Petition to file a Bill in Equity against the delinquent stockholders and Order of Court thereon filed December 26, 1934.

Petition to intervene, affidavit thereto and Order of Court filed February 15, 1935.

Petition to rescind order of June 19, 1933, affidavit thereon and Order of Court filed February 15, 1935.

Answer to petition to show cause filed March 6, 1935.

Opinion of Court filed July 27, 1935.

Decree passed and filed July 31, 1935.

Petition for authority to take appeal and Order of Court thereon filed August 6, 1935.

Order for appeal filed August 7, 1935.

STATE OF MARYLAND,

WASHINGTON COUNTY, to wit:

I, Edward Oswald, Clerk of the Circuit Court for Washington County, do hereby certify that the aforegoing is truly taken from the Record of Proceedings in the above entitled cause.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of the Circuit Court for Washington County at Hagerstown, this 27th day of August, A. D., 1935.

EDWARD OSWALD, Clerk.

Approved as the record in the appeal of the above entitled case to the Court of Appeals of Maryland.

ELIAS B. HARTLE,
Counsel for Receiver, Appellant.

WILLIAM H. BOVEY,
Special Counsel for Receiver, Appellant.

D. ANGLE WOLFINGER,
JOHN WAGAMAN,
CHARLES F. WAGAMAN,
Attorneys for Appellees.

[fol. 43] In Court of Appeals of Maryland, October Term, 1935

No. 61

John J. Ghingher, Bank Commissioner, Receiver for The Peoples Banking Company of Smithsburg, Maryland,

vs.

The Stockholders of the Peoples Banking Company of Smithsburg, Maryland, a Body Corporate

Docket Entries

Appeal from the Circuit Court for Washington County. Filed August 29, 1935.

January 22, 1936. Decree reversed, and cause remanded, with costs to the appellant. Opinion filed. Op.—Mitchell, J.

February 20, 1936. Decree filed.

February 20, 1936. Motion for Reargument filed.

April 15, 1936. Motion for Reargument overruled.

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Bill of costs omitted in printing.

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[fol. 44] In Court of Appeals of Maryland, October Term, 1935

No. 61

John J. Ghingher, Bank Commissioner, Receiver for the Peoples Banking Company of Smithsburg, Maryland,

vs.

The Stockholders of The Peoples Banking Company of Smithsburg, Maryland

Opinion—Filed January 22, 1936

Judge Mitchell delivered the Opinion of the Court:

On the 5th day of May, 1933, John J. Ghingher, then Bank Commissioner of the State of Maryland, was appointed

receiver of The People's Banking Company of Smithsburg, hereinafter called the bank, by the Circuit Court for Washington County, Maryland, and assumed charge of the affairs of the bank in accordance with the provisions of Section 9 of Article 11 of the Code of Maryland, as supplemented by Chapter 46 of the Acts of 1933, commonly known as the "Emergency Banking Act," which latter Act took effect on March 4th, 1933.

On June 19th, 1933, a petition was filed by the receiver, which, in substance, set forth that the bank was originally incorporated on January 24th, 1910, under the provisions of Article 11, with a capital stock of $20,000, divided into 2,000 shares of the par value of $10.00 each; and that on January 13th, 1922, the original articles of incorporation of said institution were amended, whereby the capital stock was increased to the sum of $40,000, divided into 4,000 shares of like par value; all of which stock was outstanding at the time of the filing of the petition.

It was further alleged in the petition, that in the course of the liquidation of the affairs of the defendant bank, the [fol. 45] Commissioner had ascertained, with absolute certainty, the existence of a deficiency between its assets and liabilities, far in excess of $40,000, representing the approximate par value of the authorized and outstanding capital stock of the institution; and accordingly, it was prayed that an order be passed determining and adjudging that each stockholder of the bank be required to pay to the receiver a sum equal to the par value of the stock held by him; and finally, that the petitioner be authorized and directed to collect, and enforce payment thereof against the stockholders through appropriate legal proceedings.

On the date the petition was filed, the Court passed a summary order decreeing that each stockholder of the bank be required to pay to the receiver an amount equal to the par value of the share or shares of the capital stock of the institution held by him; and authorized and empowered the receiver to collect and enforce payment of the stock liability.

On February 15th, 1935, a petition was filed in the receivership proceedings, by Daniel E. Bachtell and others, in which it was set forth that the petitioners had been made defendants in a separate suit filed in said court by the re-

ceiver on January 28th, 1935, for the purpose of recovering the statutory liability upon stock held by them in said bank.

The petitioners alleged that they had only recently acquired knowledge of the summary order passed against them; that they were advised that said order precluded them, and each of them, from making their respective defense on the merits, and thereby precluded any denial of the need for, or liability of the petitioners upon, the assessment made in the order; and, after setting forth that not having been made parties to the suit at the time of the passage of the order, they were taken by surprise, through the attempted enforcement against them, they further alleged as follows:

"That your petitioners are informed, believe and therefore allege that the various debts and liabilities of said The Peoples Banking Company of Smithsburg, Maryland, for the payment of which recovery is sought in the aforemen- [fol. 46] tioned equity cause, accrued against said bank at various times over a period of years, and that all of said debts and liabilities did not accrue during the time that all of your petitioners were alleged holders of the stock of said banking company.

"That said order was passed without any allegation or proof that your petitioners held stock in said The Peoples Banking Company of Smithsburg, Maryland, at the time or times when the various debts and liabilities of said banking company accrued against it.

"That said order was passed without any allegation or proof that the various debts and liabilities of said bank accrued during such time or times as your petitioners were alleged holders of stock of said banking company.

"That your petitioners are informed, believe and therefore allege that even though they should be held liable to an assessment for any payment of double liability upon the shares of stock alleged to be held by them, that your said petitioners are, if liable at all, which they do not admit, liable only under the provisions of the banking laws of Maryland, for such debts and liabilities of said bank as accrued during the respective periods during which they may be proved to have held stock therein.

"That the aforesaid order renders your petitioners liable as of course as alleged stockholders of said banking company, and likewise renders them, if liable at all, which

your petitioners do not admit, liable for larger sums of money than they, if liable, are required by law to pay.

"That the statutes of Maryland, under and by virtue of which said order of assessment was passed, impair the obligation of contracts, are discriminatory and deprive your petitioners of equal protection of the law, deprive your petitioners of property without due process of law, and otherwise contravene the provisions of the constitutions of Maryland and of the United States."

Finally, the petition prayed that the aforesaid order, passed on June 19th, 1933, be rescinded; and that in event the prayer for rescission be not granted, the said order be so modified as to permit defendant stockholders in said bank to offer any and all defenses they, or any of them, might have to the proceeding against them.

[fol. 47] Upon the aforegoing petition a nisi order was passed on February 16th, 1935, requiring the receiver to show cause why the petition should not be granted.

A second petition to intervene in the proceedings was filed by certain stockholders, alleging, on their part, payment of the assessments against them as stockholders, as having been made through inadvertence and mistake, and their intention to sue the receiver for the recovery of such payments. Said latter petitioners were, by order of the Court passed on February 16th, 1935, permitted to become parties to the suit.

On March 6, 1935, the receiver filed his answer to the aforegoing petition on February 15, 1935, in substance denying all the allegations of the petition.

For the purposes of the hearing, a stipulation was filed in the proceedings by counsel for the respective parties, as follows:

"That the times at which the various stockholders of the above named bank acquired their respective share or shares of its capital stock are correctly shown by the stock books of said company, which said stock books this honorable Court shall take and consider as having been duly offered in evidence and proved.

"That at the time of the closing of the aforesaid bank, the various stockholders who are petitioning this Court to strike out the assessment for double liability heretofore made against them, had on deposit in said bank the various

sums of money shown on the lists and schedules of deposits herewith filed, which said deposits shall be taken as duly proved by competent evidence in this cause.

"That deposits which are now liabilities of said bank and were such at the time of its closing were made and its other liabilities incurred from time to time over a period of years, and that all of its said deposits were not made or its other liabilities incurred during the time that all of its stockholders of record at the time of its closing were such.

"That some of the shares of stock of said bank have been held and owned continuously by the same petitioner or petitioners from before June 1st, 1910, to the present time."

[fol. 48] Attached to and forming a part of the stipulation, is found a list of stockholders who became such prior to June 1st, 1910, and a detailed statement of the respective amounts on deposit in said bank to the credit of the petitioning stockholders.

For the purposes of the hearing, it was admitted: "That without resort to the liabilities of stockholders the total assets of said bank will be insufficient to pay its liabilities to the extent of at least $40,000, and that unless recovery is made from stockholders of this bank, complete liquidation of its assets will leave more than $40,000 of its debts unsatisfied."

After a hearing, the Chancellors, on July 31st, 1935, passed a decree re-cinding the order of June 19th, 1933, whereby the receiver was authorized to enforce the liability of stockholders in said bank. The decree, however, was passed "without prejudice to such further proceedings as the receiver may be advised are proper, and in accordance with the opinion filed"; which opinion, in substance, limits the respective liability of stockholders at the time of receivership, to debts of the bank contracted during the period of such stock ownership. From that decree this appeal is taken.

The chief question presented for our determination, therefore, involves the point of time at which the double liability of a stockholder in a corporation engaged in banking, becomes fixed with respect to such stockholder, to the extent that he may be compelled to contribute his statutory pro rata share towards a fund whence are to be paid, as far as possible, the debts of the corporation, the same being insolvent.

As a preliminary step in such inquiry, a brief retrospect, embracing the legislative and constitutional antecedents of the present law relating to this subject, may tend to assist in its elucidation.

Today, banks and trust companies in this State are governed by the same statutes. Earlier, the two classes of corporations were legislated upon under separate Articles in the Code, one dealing with "Banks" and the other with "Corporations." Still earlier, so far as stockholders' liability is concerned, banks alone were subject to this pro- [fol. 49] tective provision for the benefit of creditors of such institutions. And farther yet in the past, upon the failure of a bank, its stockholders lost only what money they had actually invested, and could not be compelled to make up any deficiency that might develop in the final settlement of the bank's affairs.

Specifically, then, prior to the adoption of the Maryland Constitution of 1851, bank stockholders, in case of bank failure, were not liable to contribute to anyone any part of the deficit represented by the bank's unpaid debts.

By the Constitution of 1851, stockholders in new or rechartered banks were made liable, in the event of corporate insolvency, "to the amount of their respective share or shares of stock," in satisfaction of the bank's creditors.

The Constitution of 1864 made no material change in this provision; none was made in the 1867 Constitution; and Section 39 of Article 3 now reads:

"The General Assembly shall grant no charter for banking purposes, nor renew any banking corporation now in existence, except upon the condition that the stockholders shall be liable to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all banks shall be open to inspection under such regulations as may be prescribed by law."

In 1868 the Legislature, by Chapter 471, Section 61, (now Sec. 76, Art. 23, Code,) clarified the status of executors, trustees, and similar persons holding stock for others, as to the effect of any liability thereon.

In 1892, by Chapter 109, the Legislature added new sections to the "Corporations" Article of the Codes; one of which Section 85-L of Article 23, imposed liability for cor-

porate debts upon stockholders in safe deposit, trust and loan companies. Certain other corporations were also included, but subsequently eliminated. Members of a partnership being potentially liable for partnership debts to the extent of all they possessed, if required, and stockholders in banks being doubly liable in case of corporate insolvency, the Legislature evidently deemed it not inequitable that some such provision should be made to cover the Class of [fol. 50] stockholders named; and accordingly, imposing a less onerous burden than that borne by partners, but heavier than that of bank stockholders, it first fixed the liability of stockholders in safe deposit, trust and loan companies at double the value of the stock owned, which, together with the amount of investment in stock, in reality was "triple liability."

Later, in 1904, by Chapter 101, amending the Act of 1892, the liability of such investors was limited to an amount equal to the par value of the stock owned; thereby reducing the so-called "triple liability" to the present "double liability", the same as in the case of stockholders in banking corporations. And under its provisions, the receiver of an insolvent corporation was clothed with authority to enforce the double liability of its stockholders. This enactment effected a change in the remedy of creditors, in that prior thereto the claims of creditors had been enforced by an individual suit against a stockholder. The new law made the receiver, representing the interests of the corporation, as well as all its creditors, the proper party to initiate proceedings against all the stockholders for the enforcement of their statutory liability.

This was the situation at the beginning of 1908; and in that year Chapter 153 was enacted, making minor changes in the Act of 1904. At the same session, the legislature, by Chapter 240, Section 40, added new language to the Act of 1868, declaring that except in the case of banks, for which provision was made in the Constitution, (Sec. 39, Art. 3,) and except as provided elsewhere in the "Corporations" Article, (e. g., Sec. 147, relating to trusts, etc., companies; and Sec. 77, requiring stockholders to complete payments on stock subscriptions, in certain contingencies,) no stockholder should be held liable for corporate debts. The effect of this Act was to make clear that the Act of 1892 did

not apply to banks, and to point to the Constitution as the source of bank stockholders' liability.

In 1910, by Chapter 219, the Legislature revised the [fol. 51] "Banks" Article of the Code, repealed such of the provisions of the "Corporations" Article as applied to trust companies, and, combining them with the bank provisions, changed the title of Article 11 from "Banks" to "Banks and Trust Companies."

By virtue of this coalescence of statutes, the receiver of a bank, for the first time, was empowered to enforce the liability of its stockholders, collecting their contribution to the common fund, from which he would make distribution to the bank's creditors.

In view of the inauguration of this new system of liability enforcement, involving a change in the theories of recovery, and a corresponding modification of the rules of evidence, the cases which had been decided during the existence of the old practice were no longer controlling.

True, the statutes construed in those cases, while then relating to corporations other than banks, have since become part of the banking laws. But the Court was there considering an original legislative enactment pure and simple, lacking any specific constitutional background, and was therefore bound to construe the same according to the principles of statutory construction.

The present law upon the subject of stockholders' liability being the same in the case of banks as in the case of trust companies, it might be argued that the trust company law having been construed before it became a part of the bank law, the effect of combining the trust company law with, and making it a part of the bank law, should, under the doctrine of stare decisis, make mandatory the acceptance of prior judicial construction, in cases involving banks.

[fol. 52] But it must be recalled that the trust company law dates from 1892; its receivership feature dates from 1904, and it was merged with the banking law in 1910. The law of 1910, so far as it related to banks, was but an amplified re-statement of the constitutional provision, detailing in a legislative Act an axiom of the organic law of the State which had existed for nearly sixty years before the Legislature placed it in the Code.

Therefore the analogy falls, for the reason that we have before us, not a simple Act of Legislature, and as such, open to construction under the rules of statutory interpretation, but, in reality a basic provision of the State Constitution, as amplified in administrative detail by a subsequent act of the lawmaking body of this State.

The question, then, being one of constitutional and not statutory construction, and finding no case in which this section has been previously expounded, it is presented as one of first impression. Viewed in that aspect, the controlling force in its adjudication must be developed from an inquiry into the underlying purpose sought to be accomplished by its terms. One quickly concludes that purpose to be the protection of bank creditors. The debates of the Maryland Constitutional Convention of 1864, when this section (Sec. 39, Art. 3), was under discussion with a view to amendment, are affirmatively illuminating upon this point..

The object being apparent, and a doubt arising as to the method of its accomplishment, the resolution of that doubt depends upon the answer to the inquiry: Of a number of possible interpretations, which is best calculated to insure the rights of creditors, and at the same time operate the least harshly upon those who must bear the burden of liability?

In the case at bar, two courses lie open:

(a) To hold liable all persons owning stock at the time when it first becomes apparent that the bank's normal [fol. 53] assets are insufficient to meet its obligations, and the first step is taken to enforce stockholders' liability.

(b) To hold liable those who owned stock at the times when the various transactions took place, out of which arose the liabilities existing at the time of insolvency.

Arguments advocating either course are fraught with possibilities of inequity, injustice and hardship upon someone.

The theory of holding former stockholders liable arose as a matter of necessity, in order to prevent a failure of the remedy made mandatory by the Constitution.

Originally, the enforcement of the double liability of bank stockholders presented some difficulty. The creditor

was entitled to assert his claim, and the stockholder was bound to fulfill his obligation under the Constitution. This liability not being an asset of the bank, in the sense that the bank itself could collect from him, it became apparent that the creditor must proceed directly against the individual stockholder.

There was no actual contract, in the first instance, between stockholder and creditor; the contract being tangibly between the stockholder and the bank. Therefore, the creditor having a right of action, and a source of liability from which his claim eventually was entitled to be satisfied, and the Constitution being silent as to the method of its enforcement, the law created the fiction of a contract between the creditor and the stockholder, for the purpose of enabling a suit, the result of which would be a fulfillment of the constitutional guaranty established for the protection of the public in its dealings with institutions chartered by the State to conduct a banking business.

The suit being brought upon this fictional contract, the trial thereof became subject to the rules of evidence in cases of contract and as a natural and logical consequence, the defendant could not be held liable for any claims [fol. 54] against him which accrued at a time prior to his assuming the relation to the bank out of which arose the liability sought to be enforced. The Courts felt bound to reject claims which did not arise during the period of stockholdership of the defendant; and from the numerous cases which were decided upon the basis of this principle, the doctrine of absolute nonliability of bank stockholders for debts occurring at a time when they did not occupy that relation to the bank, came to be considered the settled law of this State in suits by creditors against individual stockholders.

It will be observed, however, that the Constitution does not fix the maximum liability to which stockholders in a banking institution, organized under the authority thereof, may be subjected; it does, though, fix the minimum liability of such stockholder, which, under its mandate, shall be "to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise." Nor does it limit the liability of stockholders to such debts as may have been incurred by the bank during the respective period of stock

ownership. It creates a liability, as an incident to stock-ownership in a banking corporation, for all its debts; and it is nowhere apparent that it was the intention of the framers of the Constitution to place upon creditors of an insolvent bank, or upon a receiver of its affairs, the insurmountable burden of proving, from day to day, and perhaps over a long period of years, the exact financial status of a banking corporation, as a condition precedent to the recovery of liability.

As we have observed, over a long period of years the Legislature took no affirmative action upon the constitutional provision, and meanwhile, Courts were left to deal with that provision without statutory amplifications. But since the Legislature of 1910, in the exercise of its inherent authority, enacted Chapter 219, now found in the Code under Section 72 of Article 11, Courts of this State must [fol. 55] deal with the original constitutional provision in the light of the legislative enactment, and whenever the latter is not in conflict with the former, their plain duty is to give full force and effect to the statute. That statute is explicit and mandatory. It provides: "Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. * * * And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation. * * *"

Construing the quoted portion of the aforegoing statute, and giving to the words used therein the ordinary acceptation of their meaning, we must conclude that "stockholders" naturally mean those who are such at the time it becomes necessary to enforce liability. It cannot mean those who formerly held stock, because such persons ceased to be stockholders upon the assignment of their stock. Such a construction is not only reasonable, but it is fortified when applied in connection with Section 71-M of the Emergency Banking Act of 1933, which, apparently being predicated upon the theory that liability of the transferor ceased upon the ordinary bona fide transfer of bank stock, especially provided as follows:

"Nothing contained in this Act shall be construed to relieve any stockholder of record in any banking institution at the time of the passage of this Act, from the liability imposed by Section 72 of this Article. Any person who may be a stockholder at the commencement of said period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the receiver for the statutory assessment on said shares. [fol. 56] The rights of indemnity and exoneration as between a stockholder as of the date of the beginning of said custody and his transferee and between subsequent transferees during said period shall not be affected by this provision, but the liability of such transferor shall terminate whenever the custody of the Bank Commissioner shall cease by reason of the exemption of the banking institution whose stock is so transferred, from the provisions of this Act as hereinbefore provided in Section 71-A, or upon the cessation of the Bank Commissioner's custody by the expiration of the time limited in said section, whichever shall first occur."

Again, it must be remembered that the statute provides that the stockholders' liability shall be an asset of the corporation for the benefit of all the creditors and depositors, if and when necessary to pay its debts. This language does not refer to persons who may have been creditors but are not now, but to those who are creditors, now, and to all of them, regardless of when their rights accrued in relation to stock ownership.

One can readily visualize the vast detail of bookkeeping, the labyrinth of accounting, in which such proceedings might well become enmeshed, as a result of attempting to ascertain what were the precise liabilities of various stockholders over a period of years, involving a stupendous quantity of petty transactions, and a review of many thousands of items found among the records of a bank, in an effort to determine the exact degree of liability of a particular defendant. Indeed, before the Act of 1910, Judge Boyd, in Murphy v. Wheatley, 102 Md. 515, reluctantly adhering to the old theory, based upon the fiction of a contract between creditor and stockholder, commented upon the regrettable consequences necessarily flowing therefrom.

[fol. 57] But when the Act of 1910 merged the trust company law with the bank law, and gave the bank receiver the power to enforce double liability against stockholders and make distribution to creditors, it swept away the fictional contract previously found necessary in order to achieve the object of the constitutional guaranty; and the right of action no longer being one of the creditor in person against an individual stockholder, but of the receiver against all the stockholders, a different theory of recovery was proper to be invoked.

In other words, the contract of the stockholder with the bank, not being a purely voluntary one, but being imposed upon him by the Constitution, was not to be restricted to such a narrow interpretation as that required when the suit was a personal one between the creditor and the stockholder. Under the fictional contract, the stockholder could be strictly held to nothing beyond the pale of his actual period of possession of the stock. Under the absolute contract between the stockholder and the bank, springing from the constitutional provision, his liability was a broad one, and included the debts of the bank as and when they reached the stage of enforceable claims against the bank, regardless of the time when the particular transaction out of which the claim arose, had its inception.

The logic runs thus: The Constitution says the stockholder shall be liable for the bank's liabilities; he shall be liable when the bank is liable; his liability is concurrent with that of the bank. He shall be called upon to pay, when the bank is called upon. If the bank is never called upon, then his potential liability dies. If it is called upon, by reason of a liability ripening into an active claim, then the quiescent liability of the stockholder is quickened into life, and his obligation to contribute becomes fixed and definite.

The Statute, amplifying the Constitution, says such lia-
[fol. 58] bility shall be an asset of the bank for the benefit of its creditors, if necessary to pay its debts. Therefore, until necessity demands, such liability remains in suspension, covering the entire body of stockholders; and when invoked, it attaches to the stockholders—that is, those holding stock in the bank at the time of such invocation.

The adoption of this interpretation is susceptible of least criticism from the standpoint of justice and equity; and

is more nearly in accord with that certainty and simplicity which should accompany the administration of law.

To hold the contrary view, would engulf all concerned in a swirling flood of litigation, so lengthy, so tedious, and so costly, that ultimately the inconclusive and discouraging nature of resort thereto would defeat the very end sought to be achieved by the basic law.

A further contention is made that, with respect to stockholders who were such before the Act of 1910 took effect, their liability is still governed by the law as it stood before 1910, leaving them subject to suits by individual creditors for the enforcement of their claims; and that so far as the Act of 1910 is attempted to be enforced in that respect, it is unconstitutional, in that it takes away a remedy previously enjoyed by such creditors. But in the view we have taken, the liability of a stockholder does not become enforceable until the bank's inability to pay the creditors is manifest; and as the record indicates that such a contingency did not arise in the present case until long after the passage of the Act of 1910, there can be no force in this argument. Furthermore, even had the Legislature not reserved existing rights, as it did in that Act, it is well settled that no one has a vested right in a remedy, and that the Legislature may change a legal remedy, so long as the one substituted is equally effective in coercive force with [fol. 59] the one repealed. B. & O. R. R. v. Maughlin, 153 Md. 367.

In view of the broader field of contention between the respective parties to this suit, the question of the right of a depositor-stockholder to set off his credit as a depositor of the bank against his liability as a stockholder of the bank, was not pressed in the argument before this Court. But inasmuch as that question was referred to and dealt with in the carefully prepared opinion of the lower Court, we deem it proper to dispose of it here.

In Cahill v. Original Big Gun Ass'n., 94 Md. 353, it is said: "The liability of the stockholder then under the statute having been settled, as a debt due from the stockholder to the creditor, there can be no valid reason, it seems to us, why a stockholder who is also a creditor should not be entitled as a matter of equity to set up as an equitable defense, the debt of the bank to him against his own liability. Mr. Cooke in his book on Corporations, vol. 1, sec. 225 (c),

says that it has been held that where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholder cannot set off an indebtedness of the corporation to him. He must pay in what the statute requires and then prove his claim against the corporation like any other creditor. But where the shareholder's liability by statute is immediate and personal and several and any creditor may sue any shareholder, then the shareholder may set off a debt owing to him from the corporation, when he is sued by a corporate creditor. In 1 Beach on Private Corporations, sec. 727, it is said: 'But if the statute imposes upon shareholders a personal liability to creditors, immediate and several, so that any creditor may institute an independent action against any shareholder for the enforcement of corporate debts, then a defendant shareholder may set off debts due from the company to himself.' In Taylor on Private Corporations, sec. 732, it is thus stated: [fol. 60] 'When a single creditor can and does sue a shareholder at law, to enforce the statutory liability of the latter, it is then competent for the shareholder to set off a debt owing him from the corporation.' ''

The case from which the above quotation is taken, is cited in the opinion of the lower Court in justification of its favorable ruling for the allowance of a depositor-stockholder's set-off in the instant case. We cannot agree with that conclusion; (a) because we are not here dealing with a corporation charter which, as in the cited case, specifically provided that: "The continuance of this corporation shall be on the condition that the stockholders and directors of the corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise;" and, (b) because that decision was rendered prior to the passage of the Act of 1910 definitely declaring the liability of all stockholders to be an asset of the corporation, for the use and benefit of all creditors alike.

In Poe on Pl. & Pr., vol. 1, sec. 613, it is said: "A set-off, technically, means a cross claim, and is confined to mutual debts between the plaintiff and defendant. * * To entitle the defendant to make such a defense, he must not only have a right to receive the amount due him from the plaintiff, but his claim must be of such a nature that he can sue for and recover it in a court of law. * * And it may

be stated, in general terms, that to authorize a set-off the debts must be mutual, must be between the parties in their own rights, must be of the same kind and quality, and be certain and clearly ascertained or liquidated."

Applying the above fundamental principles to the facts in the instant case, we are unable to differentiate between stockholders who are depositors, and stockholders who are not. The former class stand in the dual capacity of debtors and creditors of the involved corporation, and should be so [fol. 61] dealt with in the liquidation of its affairs.

For the reasons stated, the decree below will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Decree reversed, and cause remanded, with costs to the apppellant.

[File endorsement omitted.]

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[fols. 62 & 63] In Court of Appeals of Maryland, October Term, 1935

No. 61

John J. Ghingher, Bank Commissioner, Receiver for the Peoples Banking Company of Smithsburg,

vs.

The Stockholders of the Peoples Banking Company of Smithsburg

Decree—Filed February 20, 1936

The Appeal in the above entitled case, standing ready for hearing, was argued by counsel for the respective parties, and the proceedings have since been considered by the Court.

It is thereupon on this 19th day of February, 1936, by the Court of Appeals of Maryland, and by the authority thereof, adjudged, ordered and decreed that the decree dated July 31st, 1935, of the Circuit Court for Washington County, be and the same is hereby reversed, and cause remanded, with costs to the appellant.

Carroll T. Bond, Chief Judge, for the Court

[fol. 64] IN COURT OF APPEALS OF MARYLAND

ORDER ALLOWING APPEAL—Filed July 13, 1936

And now, to wit, on July 13, 1936, it is Ordered, That an appeal from the Court of Appeals of Maryland to the Supreme Court of the United States be allowed as prayed upon the filing of a bond for costs in the sum of Five Hundred ($500.00) Dollars with good and sufficient security, and that United States Fidelity and Guaranty Company is accepted as surety on said bond and said bond is now approved.

Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland.

[fol. 64½] [File endorsement omitted.]

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[fol. 65] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENTS OF ERROR—Filed July 13, 1936

Now come G. Wm. Gardenhour, et al., appellees in the Court of Appeals of Maryland, petitioners in the Circuit Court for Washington County, Maryland and hereinafter called "appellants" and for their assignment of errors show:

1. That the Court of Appeals of Maryland erred in holding valid and constitutional said section 72 and in holding that said statute imposed upon the appellants a liability as holders of bank stock different from the contractual liability assumed by said appellants under the long established and well settled law of Maryland at the time of their respective purchases of shares of stock and thereby impaired the obligation of the contract entered into by said appellants contrary to section 10 of Article 1 of the Constitution of the United States, and deprived them of property without due process of law contrary to section 1 of the Fourteenth Amendment of the Constitution of the United States in the following respects:

A. By rendering them liable as stockholders of record for all the debts of the bank irrespective of the times when stock was purchased and the times the bank's debts were incurred, contrary to the long established and well settled law of Maryland, prior to the instant case, that stockholders in banks are liable under the aforesaid section 39 of Article 3 of the Constitution of Maryland and previous statutes only for debts incurred by the bank while they were stockholders.

B. By rendering them liable to the Receiver of the particular bank, contrary to the long established and well settled law of Maryland prior to the instant case, that stockholders of banks are liable under the aforesaid section 39 of Article 3 of the Constitution of Maryland and previous statutes only to the creditors thereof, and thereby [fol. 66] deprived them of the right to set off against their respective liability what, if any, debt was due them from the bank as was by said long established and well settled law of Maryland prior to the instant case, permitted in suits against them by individual creditors.

2. That the Court of Appeals of Maryland erred in holding valid and Constitutional Section 72 and in holding that said statute imposed liability only upon stockholders of record contrary to the long established and well settled law of Maryland at the time of the making of deposits in said bank by the appellant depositors and creditors of said bank, and thereby deprived them of property without due process of law contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States and impaired the obligation of their contract with the stockholders contrary to Section 10 of Article 1 of the Constitution of the United States.

A. By depriving the appellant depositors and creditors of said bank of their contractual right and all remedy to recover against stockholders who were such at the time their respective deposits were made or the bank became otherwise indebted to them, but who are no longer stockholders thereof, contrary to the long established and well settled law of Maryland prior to the instant case, that the liability of the stockholders under the aforesaid section 39 of Article 3 of the Constitution of Maryland and previous

statutes for any debt of the bank incurred while they were stockholders was in no manner affected by the mere transfer of their stock.

3. That the Court of Appeals of Maryland erred in holding valid and constitutional said section 72 as affecting and controlling the liability of the appellants who became stockholders before the passage of said section 72 and while Chapter 206 of the Acts of 1870 was the sole statute of [fol. 67] Maryland touching their liability upon bank stock, although said section 72 did not reserve the existing rights of creditors or liabilities of stockholders of banks (but did only as to trust companies and the Peoples Banking Company has no trust company powers) under the existing law (Chapter 206, Acts of 1870) at the time of its passage or taking effect, and thus said section 72 was given a retroactive and unconstitutional effect on rights and contracts created prior to its passage thus impairing the obligation of appellants' contracts and depriving the appellant stockholders and creditors of property without due process of law.

4. That the Court of Appeals of Maryland erred in limiting liability to stockholders of record, contrary to the long established and well settled law of Maryland prior to the instant case, that the language of the aforesaid section 39 of Article 3 of the Constitution of Maryland and previous statutes imposed upon stockholders of banks a contractual liability for only such debts of the bank as were incurred while they were stockholders, from which liability they were not discharged by the mere transfer of their stock, and thus only by a misconstruction of said section 72 does the same impair the obligation of contracts of these appellants and deprive them of property without due process of law.

Wherefore, the appellants pray that the said decree of the Court of Appeals of Maryland made and entered on February 20, 1936 be reversed and that said Court may be directed to enter a decree in favor of the appellants.

Respectfully submitted,

D. Angle Wolfinger, John Wagaman, Charles F. Wagaman.

[fol. 67½] [File endorsement omitted.]

[fols. 68-72] Bond on appeal for $500.00, approved and filed July 13, 1936, omitted in printing.

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[fol. 73] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 74] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF APPELLANTS OF THE POINTS OF LAW ON WHICH THEY INTEND TO RELY AND THE PARTS OF THE RECORD NECESSARY FOR CONSIDERATION OF THE SAME—Filed August 20, 1936

A. Points of Law

1. That section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland is invalid and unconstitutional, because it imposes upon the appellants as holders of stock in the above mentioned bank, a liability different from the contractual liability assumed by said appellants and imposed upon them under the Constitution of Maryland and under the long established and well-settled law of said State at the time of their respective purchases of shares of stock of said bank and thereby impairs the obligation of the contracts entered into by said appellants contrary to section 10 of Article 1 of the Constitution of the United States and thereby deprives them of property without due process of law contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States:

(a) In that said section 72 renders the appellants liable for all debts of the bank irrespective of the times when their said stock was acquired and the times the bank's debts were incurred, contrary to their said contract and the long established and well-settled law of Maryland that stockholders in banks are liable under section 39 of Article 3 of the Constitution of Maryland and statutes passed pursuant thereto and in accordance therewith only

for debts incurred by the bank while they were stockholders;

[fol. 75] (b) And in that said section renders the appellants liable to the Receiver contrary to the long established and well-settled law of Maryland that stockholders of banks are liable under their said contracts and under the aforesaid section 39 of Article 3 of the Constitution of Maryland and statutes passed pursuant thereto and in accordance therewith only to the creditors of said Bank and thereby deprives the appellants of the right to set off against their respective liability what, if any, debt was due them from the bank, to which set off they were entitled by said contract under the long established and well-settled law of Maryland.

2. That said section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland is invalid and unconstitutional because it deprives the appellants of property without due process of law contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States and because it impairs the obligation of their contracts made between stockholders and creditors of the above named Bank contrary to section 10 of Article 1 of the Constitution of the United States, by limiting liability to stockholders of record and depriving the appellant depositors and creditors of said Bank of their contractual right and all remedy to recover against stockholders who were such at the time their respective deposits were made, or the Bank became otherwise indebted to them, but who are no longer stockholders thereof, and depriving the appellant stockholders of the right to contribution from former stockholders, to which said rights and remedies they were entitled under said section 39 of Article 3 of the Constitution of Maryland and statutes passed pursuant thereto and in accordance therewith and under the long established and well-settled law of Maryland that stockholders were not discharged from liability by the mere transfer of their stock.

[fol. 76] 3. That said section 72 is invalid and unconstitutional and impairs the obligation of the appellants contracts contrary to section 10 of Article 1 of the Constitution of the United States and deprives them of property without due process of law contrary to section 1 of the

Fourteenth Amendment to the Constitution of the United States because said section 72 contains no reservation of the existing rights of creditors or liabilities of stockholders of banks (but does only as to trust companies and the above named bank has no trust powers) at the time of its passage or taking effect and thus retrospectively imposes upon the appellants who became stockholders in said bank before the passage of said section 72 (effective June 1, 1910 to date), and while Chapter 206 of the Acts of 1870 (effective June 1, 1870 until June 1, 1910) was the sole statute of Maryland imposing liability upon the holders of bank stock, a liability different than that imposed by said Act of 1870.

4. That the invalidity and unconstitutionality of said section 72 result, for the reasons aforesaid, only because of the misconstruction placed upon the same by the Court of Appeals of Maryland in limiting the liability purporting to be imposed by said section 72 to stockholders of record only; whereas, the proper construction of said section (in accordance with the long established and well-settled law of Maryland under said section 39 of Article 3 of the Constitution of Maryland that stockholders of banks are contractually liable only for such debts of the bank as were incurred while they were stockholders) will preserve the validity of said section and the constitutional rights of the appellants.

B. Portions of Record Necessary to Consideration of the Above Points of Law

The appellants designate as the portions of the record necessary for the consideration of the points relied upon [fol. 77] by them, to be the entire transcript of the record transmitted to the Supreme Court of the United States by the Court of Appeals of Maryland, except as follows:

The Clerk of the Supreme Court of the United States shall omit from the printed record (unless required by the rules of said Court to be included therein) the following portions of the transcript:

1. Petition for appeal from the Court of Appeals of Maryland to the Supreme Court of the United States and Order of Court thereon.

2. Citation to appellee and proof of service thereof.

3. Statement of appellants as to jurisdiction of Supreme Court of the United States.

4. Appellants' assignment of errors.

5. Statement served upon the attorneys for the appellee setting forth, and directing their attention to, the provisions of paragraph 3 of rule 12 of the Revised Rules of the Supreme Court of the United States, and acknowledging service upon them of petition for and Order of Court allowing appeal, appellants' assignment of errors and appellants' statement as to jurisdiction.

6. Statement of appellee making against the jurisdiction of the Supreme Court of the United States and moving to dismiss or affirm.

7. Stipulation for transcript of record from Court of Appeals of Maryland to Supreme Court of the United States.

D. Angle Wolfinger, John Wagaman, Charles F. Wagaman, Attorneys for Appellants.

Service acknowledged this 14th day of August, 1936.
Elias B. Hartle, William H. Bovey, Attorneys for Appellee.

[fol. 78] [File endorsement omitted.]

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[Endorsed on cover:] File No. 40,838. Maryland Court of Appeals. Term No. 298. Stockholders of Peoples Banking Company of Smithsburg, Maryland, appellants, vs. Warren F. Sterling, Receiver for Peoples Banking Company of Smithsburg, Maryland, etc. Filed August 20, 1936. Term No. 298, O. T., 1936.

CLERK'S COPY.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1936

## No. 299

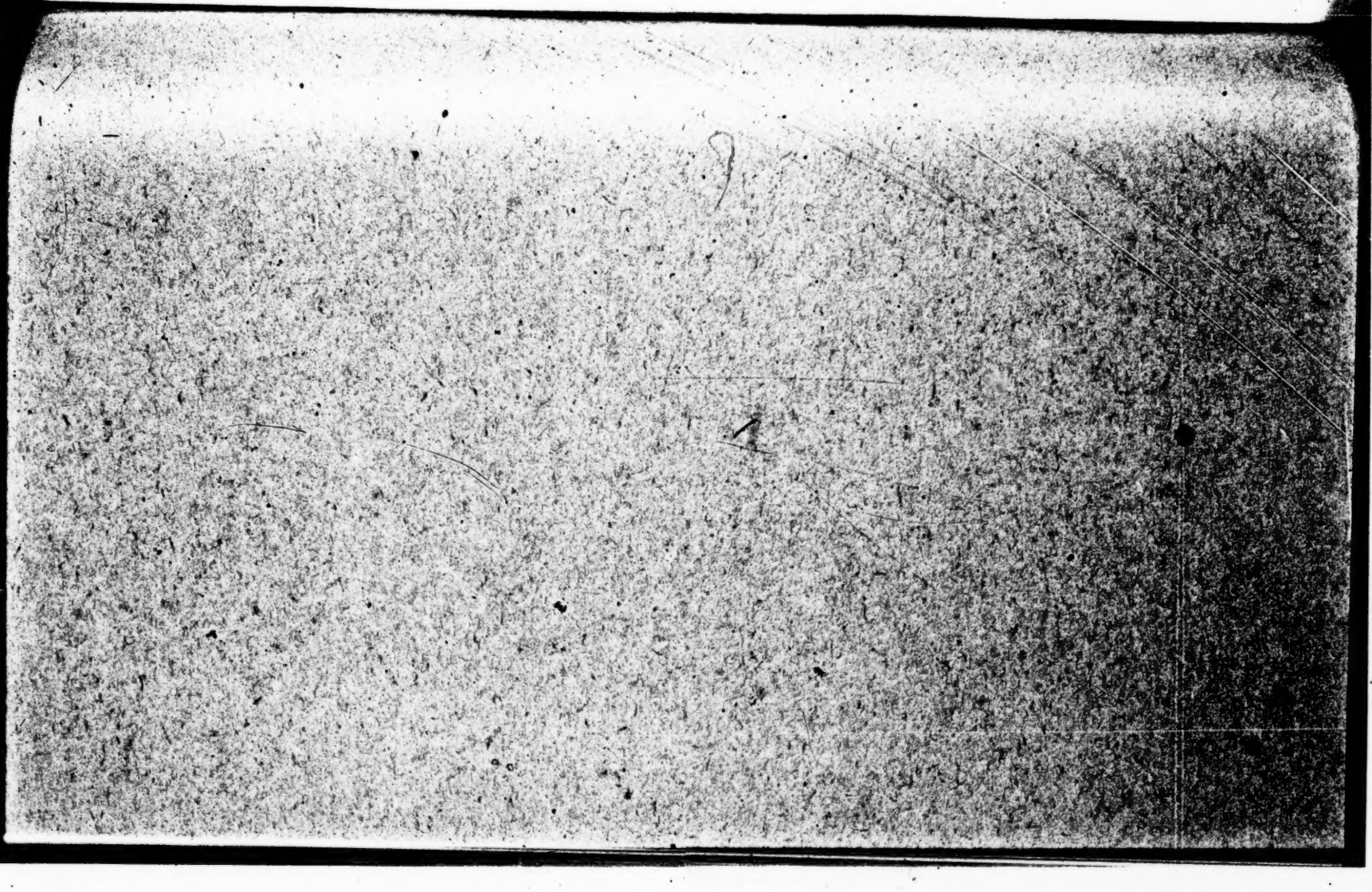
STOCKHOLDERS OF HAGERSTOWN BANK AND TRUST COMPANY, APPELLANTS,

*vs.*

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, ETC.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED AUGUST 28, 1936.



# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1936

# No. 299

STOCKHOLDERS OF HAGERSTOWN BANK AND TRUST COMPANY, APPELLANTS,

*vs.*

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, ETC.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

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STATE OF MARYLAND

VS.

THE HAGERSTOWN BANK AND TRUST COMPANY

A Body Corporate

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No. 12,777 Equity

IN THE CIRCUIT COURT

FOR WASHINGTON COUNTY

SITTING AS A COURT OF EQUITY

TITLING

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| STATE OF MARYLAND | No. 12,777 Equity |
| Vs. | IN THE CIRCUIT COURT |
| HAGERSTOWN BANK AND TRUST COMPANY | FOR WASHINGTON |
| A Body Corporate | COUNTY |

Upon the filing of a proper Bill of Complaint and other necessary prerequisites, including an answer by The Hagerstown Bank and Trust Company admitting insolvency, the following Decree was passed:

DECREE

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| STATE OF MARYLAND | IN THE CIRCUIT |
| Vs. | COURT |
| HAGERSTOWN BANK AND TRUST COMPANY | FOR WASHINGTON |
| A Body Corporate | COUNTY IN EQUITY |

Upon the aforegoing Bill, Affidavit and Answer, it is this 3rd day of December, in the year Nineteen Hundred and Thirty-Four, by the Circuit Court for Washington County, ORDERED that John J. Ghingher, Bank Commissioner for the State of Maryland, be, and he is hereby named and continued as Receiver for the Hagerstown Bank and Trust Company, a body corporate, with power and authority to take charge and possession of the books, papers, property and effects of every kind belonging to the said Hagerstown Bank and Trust Company, and to collect the outstanding debts due to the said institution, and to employ all necessary clerical or other assistance in the performance of his duties as Receiver; that the said Hagerstown Bank and Trust Company, its officers, agents and employees be required to yield up and deliver to the said Receiver the books, papers, property and effects of every kind belonging to said institution, subject to the further order of this Court.

And it is further ordered that the said John J. Ghingher, as Receiver, be required to give bond to the State of Maryland in the penalty of Three Hundred Thousand Dollars with corporate surety to be approved by this Court or the Clerk thereof; conditioned for

the faithful performance of the trust reposed in him by this order, and by the provisions of law, or which may be reposed in him by any further order or decree that may be passed in the premises.

FRANK G. WAGAMAN.

Filed Dec. 3, 1934.

Pursuant to the aforegoing Decree, John J. Ghingher, Bank Commissioner of the State of Maryland duly qualified as such Receiver.

PETITION OF RECEIVER FOR DETERMINATION OF LIABILITY OF STOCKHOLDERS AND ORDER OF COURT THEREON.

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| STATE OF MARYLAND<br>Vs.<br>THE HAGERSTOWN BANK AND TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

To the Honorable, the Judges of said Court:

This, the petition of John J. Ghingher, Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company, respectfully represents:—

1.—That the said The Hagerstown Bank and Trust Company was originally incorporated under the name of Maryland Surety and Guaranty Company, by Chapter 298 of the Acts of the General Assembly of Maryland of 1902; that its charter was thereafter amended by Chapter 215 of the Acts of the General Assembly of Maryland of 1904; that said charter was again amended by Chapter 410 of the Acts of the General Assembly of Maryland of 1908, wherein the name of said corporation was changed to that of The Maryland Surety and Trust Company; that the aforesaid charter was again amended by Articles of Amendment, dated December 4, 1928, and recorded in the Record of Incorporations, Liber No. 3, folio 52, one of the Records in the office of the Clerk of the Circuit Court for Washington County, Maryland, wherein the name of said corporation was changed to that of The Hagerstown Bank and Trust Company.

2.—That for a great many years the said The Hagerstown Bank and Trust Company had been conducting a general banking and trust business, with its

principal office in the City of Hagerstown, Washington County, Maryland.

3.—That the total amount of capital stock of said corporation is $550,000, divided into 55,000 shares of the par value of $10.00 each, all of which stock has been issued and is now outstanding.

4.—That by Section 39 of Article III, of the Constitution of Maryland, it is provided as follows:

"The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; . .

And by Section 72 of Article 11 of Bagby's Annotated Code of Maryland, Edition of 1924, it is provided as follows:

"Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee, shall not be personally subject to any liability on such stock, but the one pledging stock, and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares; and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a Receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction. Nothing in this section or article shall be construed to repeal or affect the existing rights of creditors or liabilities of stockholders of any trust company under the existing law at the time of the passage or taking effect of this article."

5.—That in the course of the liquidation of the affairs of the said The Hagerstown Bank and Trust Company, under the supervision of this Honorable Court,

your Petitioner has had an opportunity to ascertain the probable value of its property and the collectibility of its choses in action, and while it is impossible at this time to state the exact amount of the deficiency between the amount which will be realized in the final liquidation of the said bank, and the aggregate amount of its contracts, debts and engagements, your Petitioner is in a position to state, with absolute certainty, and therefore alleges that said deficiency will be far in excess of $550,000.00, the aggregate par value of the authorized, issued and outstanding shares of the capital stock of the said corporation, that is to say, the payment in full of a sum equal to the par value of all the shares of the authorized capital stock of said bank, taken with all its other assets, will not discharge in full all of its contracts, debts and engagements, and your Petitioner therefore alleges that it is necessary and proper that each stockholder of said bank be called upon to pay to your Petitioner a sum equal to the par value of the share or shares of stock held by him.

Wherefore, your petitioner prays that an order be passed determining and adjudging that each stockholder of said bank be called upon and required to pay your Petitioner a sum equal to the par value of the share or shares of stock held by him, and that your Petitioner be authorized and directed to collect said sums of money and enforce payment thereof by appropriate legal proceedings.

Respectfully submitted
JOHN J. GHINGHER,
Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company.

Edw. Oswald, Jr.,
Attorney for Petitioner.

STATE OF MARYLAND,
CITY OF BALTIMORE, To wit:

I hereby certify that on this 14th day of January, 1935, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared John J. Ghingher, Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company, and made oath in due form of law that the matters and facts set forth in the aforegoing petition are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal the day and year last above mentioned.

(N. P. SEAL) Winifred A. Duggan, Notary Public.

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| STATE OF MARYLAND<br>Vs.<br>THE HAGERSTOWN BANK AND TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

Upon the aforegoing petition and affidavit, it is this 16th day of January, 1935, adjudged, ordered and decreed by the Circuit Court for Washington County, sitting as a Court of Equity, that each stockholder of The Hagerstown Bank and Trust Company be, and he is hereby required to pay to John J. Ghingher, Bank Commissioner, Receiver for the said The Hagerstown Bank and Trust Company, or his successor in trust, an amount of money equal to the par value of the share or shares of the capital stock of said The Hagerstown Bank and Trust Company held by him, and it is further ordered that John J. Ghingher, Bank Commissioner as Receiver for The Hagerstown Bank and Trust Company, or his successor in trust, be and he is hereby authorized and empowered to collect said sums of money and to enforce payment thereof by appropriate legal proceedings; provided that notice of the filing of said petition, containing the substance of the allegations thereof, together with a copy of this order, be mailed, postage prepaid, on or before the 24th day of January, 1935, to each of said stockholders, at his, her or its residence or place of business, as the same shall appear on the books of the said The Hagerstown Bank and Trust Company; and provided further that no good cause to the contrary be shown to this Court on or before the 23rd day of February, 1935.

Frank G. Wagaman

Filed Jany. 16th, 1935.

ANSWER OF JOHN S. KAUSLER SHOWING CAUSE AGAINST IMPOSITION OF DOUBLE STOCK LIABILITY AND AFFIDAVIT THERETO.

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| STATE OF MARYLAND<br>Vs.<br>THE HAGERSTOWN BANK AND TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

To the Honorable, the Judges of said Court:

This, the answer of John S. Kausler, one of the stockholders of The Hagerstown Bank and Trust Company, to the petition of John J. Ghingher, Bank Commissioner, Receiver of The Hagerstown Bank and Trust Company, and to the order passed by this Honorable Court on said petition requiring each stockholder of The Hagerstown Bank and Trust Company to show cause, which said petition and order were filed in this cause on January 16, 1935, respectfully represents:

1.—That this respondent admits the allegations in the 1, 2, 3, and 4th paragraphs of said petition.

2.—Answering the 5th paragraph of said petition and the order to show cause this respondent alleges that even upon a showing of insolvency this Honorable Court is without jurisdiction and power to pass said order.

3.—That this respondent is the owner of 135 shares of the par value of $10.00 each of the capital stock of The Hagerstown Bank and Trust Company, which this respondent has acquired at various times, various parts or blocs of which this respondent has held and owned for definite periods of time, some of which he has held and owned since the 25th day of February, 1922, and some of which he has owned only since the 17th day of February, 1933.

4.—That there is before this Honorable Court no proper allegation or proof of the time or times when the various liabilities of said corporation accrued against it nor as to the names and stockholdings of persons who were at said times the owners of the shares of the capital stock of said corporation; and this respondent avers that under the laws of Maryland, he can be held liable, if at all, which he does not admit, upon the shares of stock of said corporation owned by him only for the payment of such debts and liabilities of said corporation as accrued against it at a time or times when he was the owner of the share or shares of said stock upon which said assessment is sought, but not, in any event, to the petitioner.

5.—That this respondent had on deposit with the said The Hagerstown Bank and Trust Company at the time of its closing $730.22 for which sum of money this respondent has a valid and subsisting claim against said bank and for which sum this respondent has a valid and subsisting claim, if anyone has, against the various stockholders thereof; and this respondent says that he is entitled to and claims the right to set off his said deposit claim against the double stock liability, if any, upon the aforesaid shares.

6.—That the provisions of Section 72 of Article 11 of Bagby's Annotated Code of Maryland, Edition of 1924, as in said petition referred to, under and by virtue of which said order was passed, impair the obligation of contracts, are discriminatory and deprive this respondent as a stockholder and creditor of said bank of equal protection of the law, deprive this respondent as a stockholder and creditor of said bank of property without due process of law and otherwise contravene the provisions of the Constitutions of Maryland and of the United States.

7.—That for the causes hereinbefore shown as well as for other causes to be shown at the hearing of this matter, this respondent says that no order of assessment should be passed or made final authorizing John J. Ghingher, Bank Commissioner, Receiver of said The Hagerstown Bank and Trust Company, to collect any assessment from this respondent in this cause.

Wherefore, having fully answered said petition and said order, this respondent prays that the aforesaid petition and order to show cause may be dismissed and discharged with reasonable costs to this respondent.

Respectfully submitted,
John Wagaman,
Charles F. Wagaman,
Solicitiors for Petitioners.

STATE OF MARYLAND,
WASHINGTON COUNTY, To wit:

I hereby certify, That on this 27th day of March, A. D., 1935, before me, the subscriber, a Notary Public of the State of Maryland, in and for the county aforesaid, personally appeared John S. Kausler, who made oath in due form of law that the matters and facts set forth in the aforegoing petition are true to the best of his knowledge, information and belief.

In witness whereof I have hereunto subscribed my

name and affixed my notarial seal this day and year last above written.

(N. P. SEAL) Stella I. Sleasman, Notary Public.

Filed March 28th, 1935.

Other answers to said petition substantially identical in form and substance with the answer of John S. Kausler were filed by various other stockholders of said bank as is shown by the Docket Entries. All of said answers were filed within the time fixed by the Court.

ANSWER OF IDA M. NEWCOMER AND JOSEPH W. HOWE, EXECUTRIX and EXECUTOR, TO PETITION OF JOHN J. GHINGHER, RECEIVER AND ORDER OF COURT THEREON

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| STATE OF MARYLAND | NO. 12,777 EQUITY |
| Vs. | |
| THE HAGERSTOWN BANK AND TRUST COMPANY, | IN THE CIRCUIT COURT FOR WASHINGTON |
| A Body Corporate | COUNTY |

To the Honorable, the Judges of said Court:

This, the answer of Ida M. Newcomer and Joseph W. Howe, Executrix and Executor of the Last Will and Testament of Joseph S. Newcomer, late of Washington County, State of Maryland, deceased, to the Petition of John J. Ghingher, Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company, and to the Order and Decree of this Honorable Court, passed upon said Petition as of the 16th day of January, 1935, requiring stockholders of the said The Hagerstown Bank and Trust Company to show cause why they should not be required to pay the Receiver of said Corporation an amount equal to the par value of the shares of the capital stock by them held, respectfully represents:

1.—That these Respondents admit the averments of the first paragraph of said petition.

2.—That these Respondents admit the averments of the second paragraph of said Petition.

3.—That these Respondents admit the averments of the third paragraph of said Petition.

4.—That these Respondents admit the averments of the fourth paragraph of said Petition.

5.—Answering the fifth paragraph of said petition

and the order of this Honorable Court, requiring cause to be shown, these Respondents aver and say:

a.—That these Respondents obtained Letters Testamentary on the estate of Joseph S. Newcomer, late of Washington County, State of Maryland, deceased, on the 23rd day of January, 1934, having been named and designated as Executrix and Executor by the Last Will and Testament of said decendent, duly recorded in the office of the Register of Wills for said Washington County.

b.—That they found amongst the assets of the said decedent two certificates of the capital stock of the said The Hagerstown Bank and Trust Company, both being dated the 28th day of December, 1928, and being respectively for forty (40) shares and for fifty (50) shares, or a total of ninety (90) shares, the par value thereof being Ten ($10.00) Dollars per share.

c.—That on the date that Letters Testamentary were granted, these Respondents caused the usual Notice to Creditors to be given in conformity with the Statute Law of the State of Maryland, and after the expiration thereof stated a First and Final Account in the matter of the settlement of said estate, in which payment was made to creditors on a basis of less than eleven per cent, the property and assets of said decedent being insufficient to discharge and pay debts and obligations due by him.

d.—That no claim was filed or asserted in said Orphans' Court by the said Petitioner with reference to any liability by said decedent, by reason of his stockholdings in the said The Hagerstown Bank and Trust Company.

e.—That notwithstanding the insolvency of the said The Hagerstown Bank and Trust Company, this Honorable Court is without jurisdiction and power to pass said Order.

f.—That these Respondents reiterate and aver that the settlement of their said decedent's estate, as hereinbefore set forth, constitutes and is a barrier to any recovery by reason of said decedent holding shares of the capital stock of said Bank, as hereinbefore set forth; but as a matter of further Answer these Respondents say that there is before this Honorable Court no proper allegation or proof of the time or times when the various liabilities of said Corporation accrued against it nor as to the names and stockholdings of the persons

who were at said times the owners of the shares of the capital stock of said Corporation; and these Respondents aver that under the Laws of Maryland, the estate of said decedent, even if solvent and not fully administered could have been held liable, if at all, upon the shares of the stock of said corporation owned by the said Joseph S. Newcomer, deceased, only for the payment of such debts and liabilities of said Corporation as accrued against it at a time or times when said decedent was the owner of the share or shares of said stock, upon which said assessment is sought, but not in any event to the Petitioner.

g.—That the provisions of Section 72 of Article 11 of the Annotated Code of Maryland, as in said Petition referred to, under and by virtue of which said Order was passed, impair the obligation of contracts, are discriminatory and deprive these Respondents, as representatives of the said deceased stockholder, of equal protection of the Law, deprive these Respondents, as representatives of the said deceased stockholder, of property without due process of Law and otherwise contravene the provisions of the Constitutions of Maryland and of the United States.

6.—That for the causes and reasons hereinbefore shown and averred and for other reasons to be assigned at the hearing these Respondents say that no Order should be passed or made final, authorizing the Petioner, John J. Ghingher, Bank Commissioner, Receiver of the said The Hagerstown Bank and Trust Company, to collect any assessment or to seek to establish liability with reference thereto, on account of the stockholdings of these Respondents' decedent.

Having fully answered said Petition and the said Order requiring stockholders of the said The Hagerstown Bank and Trust Company to show cause, these Respondents pray that said Order be not made final and that said Petition be dismissed with reasonable costs to these Respondents.

Respectfully submitted.

Levin Stonebraker,
Solicitor for Respondent.

STATE OF MARYLAND,
WASHINGTON COUNTY, to wit:

I hereby certify that on this 28th day of March, A. D., 1935, before the subscriber, a Notary Public of the State of Maryland, in and for Washington County, per-

sonally appeared Ida M. Newcomer, Executrix of the Last Will and Testament of Joseph S. Newcomer, late of Washington County, State of Maryland, deceased, respondent, and made oath in due form of law that the matters and facts set forth and averred in the foregoing Answer are true to the best of her knowledge, information and belief.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal the day and year first above written.

(N. P. SEAL) E. Jane Carty, Notary Public.

Filed March 28th, 1935.

ANSWER OF SARAH R. HOFFMAN, Executrix, TO PETITION OF JOHN J. GHINGHER, RECEIVER AND ORDER OF COURT THEREON

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| STATE OF MARYLAND<br>Vs.<br>THE HAGERSTOWN BANK AND TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

To the Honorable, the Judges of said Court:

This, the answer of Sarah R. Hoffman, Executrix of the Last Will and Testament of William K. Hoffman, late of Washington County, State of Maryland, deceased, to the Petition of John J. Ghingher, Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company, and to the Order and Decree of this Honorable Court, passed upon said Petition as of the 16th day of January, 1935, requiring stockholders of the said The Hagerstown Bank and Trust Company to show cause why they should not be required to pay the Receiver of said Corporation an amount equal to the par value of the shares of the capital stock by them held, respectfully represents:

1.—That this Respondent admits the averments of the first paragraph of said Petition.

2.—That this Respondent admits the averments of the second paragraph of said Petition.

3.—That this Respondent admits the averments of the third paragraph of said Petition.

4.—That this Respondent admits the averments of the fourth paragraph of said Petition.

5.—Answering the fifth paragraph of said petition and the Order of this Honorable Court, requiring cause to be shown, this Respondent avers and says:

a.—That this Respondent obtained Letters Testamentary on the estate of William K. Hoffman, late of Washington County, State of Maryland, deceased, on the 11th day of October, 1932, having been named and designated as Executrix by the Last Will and Testament of said decedent, duly recorded in the office of the Register of Wills for said Washington County.

b.—That she found amongst the assets of the said decedent a certificate of the capital stock of the said The Hagerstown Bank and Trust Company, being dated the 24th day of September, 1929, and being for twenty-two (22) shares, the par value thereof being Ten ($10.-00) Dollars per share.

c.—That on the date that Letters Testamentary were granted, this Respondent caused the usual Notice to Creditors to be given in conformity with the Statute Law of the State of Maryland, and after the expiration thereof stated a First and Final Account in the matter of the settlement of said estate, in which, after the payment of creditors, the property and assets of said decedent were distributed to Sarah R. Hoffman, wife of said decedent, in accordance with the provisions of his Will.

d.—That no claim was filed or asserted in said Orphans' Court by the said Petitioner with reference to any liability of said decedent, by reason of his stockholdings in the said The Hagerstown Bank and Trust Company.

e.—That notwithstanding the insolvency of the said The Hagerstown Bank and Trust Company, this Honorable Court is without jurisdiction and power to pass said Order.

f.—That this Respondent reiterates and avers that the settlement of her said decedent's estate, as hereinbefore set forth, constitutes and is a barrier to any recovery by reason of said decedent holding shares of the capital stock of said Bank, as hereinbefore set forth; but as a matter of further Answer, this Respondent says that there is before this Honorable Court no proper allegation or proof of the time or times when the various liabilities of said Corporation accrued against it nor as to the names and stockholdings of the persons who were at said times the owners of the shares of the

capital stock of said corporation; and this Respondent avers that under the Laws of Maryland the estate of said decedent, if solvent, can be held liable, if at all, upon the shares of the stock of said Corporation owned by the said William K. Hoffman, deceased, only for the payment of such debts and liabilities of said Corporation as accrued against it at a time or times when said decedent was the owner of the share or shares of said stock, upon which said assessment is sought, but not in any event to the Petitioner.

g.—That the provisions of Section 72 of Article 11 of the Annotated Code of Maryland, as in said Petition referred to, under and by virtue of which said Order was passed, impair the obligation of contracts, are discriminatory and deprive this Respondent, as representative of the said deceased stockholder, of equal protection of the Law, deprive this Respondent, as representative of the said deceased stockholder, of property without due process of Law and otherwise contravene the provisions of the Constitutions of Maryland and of the United States.

6.—That for the causes and reasons hereinbefore shown and averred and for other reasons to be assigned at the hearing, this Respondent says that no Order should be passed or made final, authorizing the Petitioner, John J. Ghingher, Bank Commissioner, Receiver of the said The Hagerstown Bank and Trust Company, to collect any assessment or to seek to establish liability with reference thereto, on account of the stockholdings of this Respondent's decedent.

Having fully answered said Petition and said Order requiring stockholders of the said The Hagerstown Bank and Trust Company to show cause, this Respondent prays that said Order be not made final and that said Petition be dismissed with reasonable costs to this Respondent.

Respectfully submitted,
Levin Stonebraker,
Solicitor for Respondent.

STATE OF MARYLAND,
WASHINGTON COUNTY, to wit:

I hereby certify that on this 27th day of March, A. D., 1935, before me the subscriber, a Notary Public of the State of Maryland, in and for Washington County, personally appeared Sarah R. Hoffman, Executrix of the Last Will and Testament of William K. Hoffman, late of Washington County, State of Maryland, deceased, Re-

spondent, and made oath in due form of law that the matters and facts set forth and averred in the foregoing Answer are true to the best of her knowledge, information and belief.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal the day and year first above written.

(N. P. SEAL) E. Jane Carty, Notary Public.

Filed March 28th, 1935.

RECEIVER'S REPORT AND STATEMENT OF ASSETS AND LIABILITIES IN CONNECTION WITH THE ASSESSMENT OF STOCKHOLDERS

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| STATE OF MARYLAND<br>Vs.<br>THE HAGERTOWN BANK AND TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

To the Honorable, the Judges of said Court:

The report of John J. Ghingher, Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company, respectfully represents:

1.—That on the 16th day of January, 1935, your Receiver filed a petition in the above entitled cause in which he prayed this Honorable Court to pass an order determining and adjudging that each stockholder of The Hagerstown Bank and Trust Company be called upon and required to pay to your Receiver a sum equal to the par value of the share or shares of stock held by such stockholder, and that your Receiver be authorized and empowered to collect said sums of money and enforce the payment thereof by appropriate legal proceedings.

2.—That upon the aforesaid petition an order of Court was passed granting the relief prayed for, provided that notice of the filing of said petition, containing the substance of the allegations thereof, together with a copy of said order, be mailed, postage prepaid, on or before the 24th day of January, 1935, to each of the stockholders of the said The Hagerstown Bank and Trust Company, at his, her or its residence or place of business, as the same should appear on the books of the said The Hagerstown Bank and Trust Company, and provided further that no good cause to the contrary be

shown to the Court on or before the 23rd day of February, 1935.

3.—That pursuant to the aforesaid order of Court, notice of the filing of said petition, together with a copy of said order of Court, was mailed, postage prepaid, on the 23rd day of January, 1935, to each of said stockholders, at his, her or its address or place of business, as the same appeared upon the books of the said The Hagerstown Bank and Trust Company, a printed copy of said notice and a printed copy of said order of Court, as mailed to each of said stockholders, as aforesaid, being filed herewith as a part hereof.

4.—That the aforesaid petition filed by your Receiver contains among other things the following allegations, to wit: "That in the course of the liquidation of the affairs of the said The Hagerstown Bank and Trust Company, under the supervision of this Honorable Court, your Petitioner has had an opportunity to ascertain the probable value of its property and the collectibility of its choses in action, and while it is impossible at this time to state the exact amount of the deficiency between the amount which will be realized in the final liquidation of the said bank, and the aggregate amount of its contracts, debts and engagements, your Petitioner is in a position to state, with absolute certainty, and therefore alleges, that said deficiency will be far in excess of $550,000.00, the aggregate par value of the authorized, issued and outstanding shares of the capital stock of the said corporation, that is to say, the payment in full of a sum equal to the par value of all the shares of the authorized capital stock of said Bank, taken with all its other assets, will not discharge in full all of its contracts, debts and engagements;" that there has now been prepared a statement of the assets and liabilities of the said The Hagerstown Bank and Trust Company as of January 16, 1935, the date of the filing of the aforesaid petition, showing the estimated recovery value of the assets of the said The Hagerstown Bank and Trust Company, without deduction for costs and expenses of liquidation, and assuming the collection of 100% of the stockholders' liability in full, which statement is filed herewith as a part hereof, and from which it will appear that the payment in full of said stockholders' liability when taken with the estimated recovery value of all other assets of the said The Hagerstown Bank and Trust Company, without deduction for costs and expenses of the liquidation of said assets, will not be sufficient to discharge in full all of its

contracts, debts and engagements, and that the deficiency will amount to the estimated sum of $1,722,134.32.

Respectfully submitted,
John J. Ghingher,
Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company.

(CORP. SEAL)
J. Lloyd Harshman
Robt. H. McCauley
Special Council.

## NOTICE TO STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY HAGERSTOWN, MARYLAND

Notice is hereby given that on the 16th day of January, 1935, a petition was filed in the Circuit Court for Washington County, Maryland, in a cause wherein the State of Maryland is Plaintiff and The Hagerstown Bank and Trust Company is the Defendant, known on the docket of said Court as Equity Cause No. 12,777; that said petition was filed by John J. Ghingher, Bank Commissioner, Receiver for the said The Hagerstown Bank and Trust Company, and alleges, among other things, the following:

That The Hagerstown Bank and Trust Company is a corporation, duly incorporated under the Laws of the State of Maryland; that for a great many years, said corporation conducted a general banking and trust business, with its principal office in the City of Hagerstown, Maryland; that the total amount of capital stock of said corporation is $550,000.00, divided into 55,000 shares of the par value of $10.00 each, all of which stock has been issued and is now outstanding; that under the Laws of the State of Maryland, the stockholders of said corporation are liable to the amount of their respective shares of stock for all of its debts and liabilities, and reference is made to Section 39 of Article III of the Constitution of Maryland, and to Section 72 of Article 11 of Bagby's Annotated Code of Maryland, Edition of 1924; that in the course of the liquidation of the affairs of said corporation, said Receiver has ascertained the probable value of its property and the collectibility of its choses in action and while it is impossible to state the exact amount of the deficiency between the amount which will be realized in the final liquidation of said

corporation, and the aggregate amount of its contracts debts and engagements, it is alleged that said deficiency will be in excess of $550,000.00 the aggregate par value of the authorized, issued and outstanding shares of the capital stock of said corporation, and that payment in full of a sum equal to the par value of all of the shares of the authorized capital stock of said corporation, taken with all its other assets, will not discharge in full all of its contracts, debts and engagements, and that it is necessary and proper that each stockholder be called upon to pay to said Receiver a sum equal to the par value of the share or shares of stock held by him.

Upon the aforesaid petition an order of Court was passed, a copy of which is enclosed herewith.

John J. Ghingher, Bank Commissioner,
Receiver for The Hagerstown Bank & Trust Co.

COPY OF ORDER OF COURT

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|---|---|
| STATE OF MARYLAND<br>Vs.<br>THE HAGERSTOWN BANK AND TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

Upon the aforegoing petition and affidavit, it is this 16th day of January, 1935, adjudged, ordered and decreed by the Circuit Court for Washington County, sitting as a Court of Equity, that each stockholder of The Hagerstown Bank and Trust Company be, and he is hereby required to pay to John J. Ghingher, Bank Commissioner, Receiver for the said The Hagerstown Bank and Trust Company, or his successor in trust, an amount of money equal to the par value of the share or shares of the capital stock of said The Hagerstown Bank and Trust Company held by him, and it is further ordered that John J. Ghingher, Bank Commissioner as Receiver for The Hagerstown Bank and Trust Company, or his successor in trust, be, and he is hereby authorized and empowered to collect said sums of money and to enforce payment thereof by appropriate legal proceedings; provided that notice of the filing of said petition, containing the substance of the allegations thereof, together with a copy of this order be mailed postage prepaid, on or before the 24th day of Jan., 1935, to each of said stockholders, at his, her or its residence or place of business, as the same shall appear on the books of the said The

Hagerstown Bank and Trust Company; and provided further that no good cause to the contrary be shown to this Court on or before the 23rd day of February, 1935.

(Signed) Frank G. Wagaman.

STATEMENT OF ASSETS AND LIABILITIES OF THE HAGERSTOWN BANK AND TRUST COMPANY AS OF JANUARY 16, 1935, SHOWING ESTIMATED RECOVERY VALUE OF ASSETS WITHOUT DEDUCTION FOR COSTS AND EXPENSES OF LIQUIDATION AND ASSUMING COLLECTION OF 100% STOCKHOLDERS' LIABILITY IN FULL

| | | |
|---|---|---|
| Total Stockholders' Liability | $ 550,000.00 | |
| Loans and discounts | 1,699,518.38 | |
| Mortgages | 85,015.27 | |
| Bonds and stocks | 215,386.09 | |
| Real estate (Appraisal) | 141,826.00 | |
| Cash and due from banks | 41,754.55 | |
| Emergency Loans (Secured) | 20,992.38 | |
| Furniture and fixtures | 2,786.57 | |
| Reserve balances in closed banks (estimated recovery) | 7,500.00 | |
| Due from Hagerstown Trust-Co. on Lease agreement | 3,199.37 | |
| Guaranty Fund (unsecured) Subscriptions unpaid | 64,075.00 | |
| Guaranty Fund (secured) Subscriptions unpaid | 25,375.00 | |
| Notes partly charged off | 50,000.00 | |
| Estimated recovery value of mortgages securing participations | 114,440.00 | |
| Bonds owned by subscribers to first Guaranty Fund | 17,000.00 | |
| | $3,038,868.61 | |
| General Creditor Liability for deposits and other claims | | $3,513,987.12 |
| Bills payable for funds borrowed | | 297,710.71 |
| Trust Deposits | | 11,272.61 |
| Mortgage int. undistributed | | 1,527.50 |
| Income from operation of mortgaged real estate | | 89.55 |
| Income (Special Account) | | 305.00 |
| Collections in Special Accts. | | 24,436.44 |

| | | |
|---|---|---|
| Collections in Trust for R. F. C. | | 234.00 |
| Participations secured by mortgages | | 144,440.00 |
| Due to Guaranty Fund Subscribers | | 750,000.00 |
| Bonds due to Subscribers to First Guaranty Fund | | 17,000.00 |
| Excess of Liabilities over Assets | $1,722,134.32 | |
| | $4,761,002.93 | $4,761,002.93 |

All cash and notes received from the Guaranty Fund are included in the above assets.

STATE OF MARYLAND,

CITY OF BALTIMORE, to wit:

I hereby certify that on this 17th day of June, 1935, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared John J. Ghingher, Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company, and made oath in due form of law that the matters and facts set forth in the aforegoing report are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal the day and year last above mentioned.

(N. P. SEAL) Anna Mae Cooke, Notary Public.

STATE OF MARYLAND,

WASHINGTON COUNTY, to wit:

I hereby certify that on this 18th day of June, 1935, before me, the subscriber, Clerk of the Circuit Court for Washington County, personally appeared Edward Oswald, Jr., and made oath in due form of law that he is the representative in direct charge of the affairs of The Hagerstown Bank and Trust Company for John J. Ghingher, Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company and that notice of the filing of the petition of the Receiver, mentioned in the aforegoing report, together with a copy of the order of Court passed thereon, was duly mailed to stockholders at the time and in the manner as alleged in the third paragraph of said report.

Witness my hand and the seal of said Court the day and year last above mentioned.

(SEAL) Edward Oswald,
Clerk of the Circuit Court
for Washington County.

STATE OF MARYLAND,
WASHINGTON COUNTY, to wit:

I hereby certify that on this 18th day of June, 1935, before me, the subscriber, Clerk of the Circuit Court for Washington County, personally appeared J. William Ernst, and made oath in due form of law that he was the Treasurer of The Hagerstown Bank and Trust Company from January, 1921, to the date of its closing; that since the date of the closing of the said The Hagerstown Bank and Trust Company he has been actively engaged in the liquidation of its assets and is now in the employ of John J. Ghingher, Bank Commissioner, Receiver for the said The Hagerstown Bank and Trust Company; that he is familiar with the value of the property and assets of the said The Hagerstown Bank and Trust Company, including the collectibility of its choses in action and that the facts and figures shown on the statement of its assets and liabilities, as of January 16, 1935, and as mentioned and referred to in the aforegoing report, are true to the best of his knowledge, information and belief.

Witness my hand and seal of said Court the day and year last above mentioned.

(SEAL) Edward Oswald,
Clerk of the Circuit Court
for Washington County.

Filed June 21, 1935.

## STIPULATION

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|---|---|
| STATE OF MARYLAND | NO. 12,777 EQUITY |
| Vs. | IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |
| THE HAGERSTOWN BANK AND TRUST COMPANY, | |
| A Body Corporate | IN EQUITY |

### STIPULATION

It is hereby stipulated and agreed that for the purposes of the hearing on the matter of the assessment against stockholders in the above named bank and for

the determination of the Court thereon the facts herein shall be taken as duly proved by the evidence on behalf of the parties to this cause whose counsel appear as parties to this stipulation.

1.—That the respective times at which the various stockholders who are showing cause against the assessment in the above entitled cause acquired their said respective shares of stock are correctly set forth in the schedule hereto attached.

2.—That none of the stock outstanding at the time of the closing of the bank was issued prior to the amendment of the Charter in 1908 by Chapter 410 of the Acts of the General Assembly of Maryland of 1908 when its name was changed from Maryland Surety and Guaranty Company to Maryland Surety and Trust Company and that the first stock of said bank originally issued was issued on June 1, 1908, and that some of the shares of stock of said bank have been held and owned continuously by the same person or persons from June 1st, 1908, to the present time.

3.—That some of the stockholders who are showing cause against the assessment in the above entitled cause had, on the date of the closing of said bank, and now have, deposits in said bank.

4.—That some of the shares of stock outstanding at the time of the closing of The Hagerstown Bank and Trust Company were transferred to the record holders thereof who are showing cause herein at the time after some of the deposits were made and some of the liabilities incurred which were at the time of its closing, and are now, part of the obligations of said bank.

5—That without resort to the liability of stockholders the total assets of said bank will be insufficient to pay its liabilities to the extent of at least $550,000.00, and that unless recovery is made from stockholders of this bank, complete liquidation of its assets will leave more than $550,000.00 of its debts unsatisfied.

J. Lloyd Harshman
Robt. H. McCauley
Special Counsel for Receiver
John Wagaman
Charles F. Wagaman
W. P. Wachter
Martin V. B. Bostetter
C. Walter Baker
Attorneys for Stockholders.

| Stockholders | No. of shares | Date acquired |
|---|---|---|
| Sidney F. Cushwa | 20 shares | 1- 3-29 |
| Susan F. Cushwa | 75 shares | 3-13-29 |
| | 550½ shares | 10-31-30 |
| Sarah K. Hoffman, Exr. | 12 shares | 9-16-22 |
| | 10 shares | 4- 3-23 |
| Anna E. Miller | 10 shares | 6- 1-08 |
| | 5 shares | 12- 1-19 |
| | 20 shares | 8-29-22 |
| Ida M. Newcomer | 240 shares | 12-29-28 |
| Ida M. Newcomer, et al exr. | 40 shares | 12-29-28 |
| | 50 shares | 12-29-28 |
| John E. Stonebraker, Admr. | 50 shares | 5-27-10 |
| | 364 shares | 10- 4-10 |
| | 90 shares | 5- 2-11 |
| | 20 shares | 5-31-11 |
| | 50 shares | 12- 1-11 |
| | 50 shares | 10- 4-13 |
| | 208 shares | 12- 1-19 |
| | 10 shares | 2-28-20 |
| | 50 shares | 11- 8-20 |
| | 79 shares | 1- 9-22 |
| | 29 shares | 5-10-22 |
| John S. Kausler | 90 shares | 12-21-28 |
| | 45 shares | 2-17-33 |
| Ardella M. Newcomer | 100 shares | 3- -1913 |
| | 33 shares | 12- 1-19 |
| | 33 shares | 8-29-22 |
| W. P. Wachter | 10 shares | 3- 3-23 |
| | 5 shares | 2-20-31 |
| | 10 shares | 6- 2-31 |
| Evelyn M. Wachter | 1 share | 1- 2-26 |
| Mildred M. W. Fiery | 1 share | 1- 2-26 |
| Julia H. Briscoe | 79½ shares | 12-20-28 |
| Julia H. Briscoe, Trustee | 2452½ shares | 12-20-28 |
| Ella B. Young | 35 shares | 6- 5-26 |
| | 25 shares | 9-24-29 |
| Wm. H. Miller | 18 shares | 12-27-28 |
| Nora Miller Baker | 100½ shares | 1-18-29 |
| C. Walter Baker | 19½ shares | 1-18-29 |
| | 34 shares | 4-17-30 |
| Gladys K. Bostetter | 27 shares | 1-18-29 |
| Crystal Bostetter Hershey | 28½ shares | 1-18-29 |
| | ½ share | 2- 4-29 |
| Martin V. B. Bostetter | 21 shares | 1-18-29 |

Filed July 8, 1935.

# STIPULATIONS

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| STATE OF MARYLAND<br>Vs.<br>THE HAGERSTOWN BANK AND TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

## STIPULATIONS

It is hereby stipulated and agreed that for the purposes of the hearing on the matter of the assessment against stockholders in the above named Bank and for the determination of the Court thereon the facts herein shall be taken as duly proved by the evidence on behalf of the parties to this Cause, whose counsel appear as parties to this stipulation.

### STIPULATION AND AGREEMENT IN CONNECTION WITH ANSWER OF IDA M. NEWCOMER AND JOSEPH W. HOWE, EXECUTRIX AND EXECUTOR OF JOSEPH S. NEWCOMER, DECEASED

a.—That the said Executrix and Executor obtained Letters Testamentary on the estate of their said decedent on the 24th day of January, 1934.

b.—That amongst the assets of said estate were two certificates representing forty (40) shares of the stock of The Hagerstown Bank and Trust Company.

c.—That notice to creditors was published in conformity with the statutory law of the State of Maryland, and after the expiration thereof, said Executrix and Executor stated a First and Final Account to wit: on the 28th day of September, 1934, in which payment was made to creditors on a basis of less than eleven per cent.

d.—That no claim was filed or asserted in the Orphans' Court by The Hagerstown Bank and Trust Company, John J. Ghingher, Receiver thereof, or by anyone on behalf of said Trust Company in connection with any liability of said decedent on account of his stockholdings in the said The Hagerstown Bank and Trust Company.

### STIPULATION AND AGREEMENT IN CONNECTION WITH ANSWER OF SARAH R. HOFFMAN, EXECUTRIX OF WILLIAM K. HOFFMAN, DECEASED

a.—That the said Executrix obtained Letters Tes-

tamentary on the estate of her said decedent on the 11th day of October, 1932.

b.—That amongst the assets of said estate was a certificate representing twenty-two (22) shares of the stock of The Hagerstown Bank and Trust Company.

c.—That notice to creditors was published in conformity with the statutory law of the State of Maryland, and after the expiration thereof said Executrix stated a First and Final Account, to wit: on the 2nd day of November, 1934, in which payment was made to creditors in full.

d.—That no claim was filed or asserted in the Orphans' Court by The Hagerstown Bank and Trust Company, John J. Ghingher, Receiver thereof, or by anyone on behalf of said Trust Company, in connection with any liability of said decedent on account of his stockholdings in the said The Hagerstown Bank and Trust Company.

Robt. H. McCauley,
J. Lloyd Harshman,
Special Counsel for Receiver.
Levin Stonebraker,
Attorney for Ida M. Newcomer and Joseph W. Howe, Executrix and Executor of Joseph S. Newcomer, deceased.
Levin Stonebraker,
Attorney for Sarah R. Hoffman, Executrix of William K. Hoffman, deceased.

Filed July 8th, 1935.

EVIDENCE

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|---|---|
| STATE OF MARYLAND | NO. 12,777 EQUITY |
| Vs. | IN THE CIRCUIT |
| HAGERSTOWN BANK | COURT FOR |
| & TRUST COMPANY | WASHINGTON |
| | COUNTY |

Attys. for Receiver:

Robert H. McCauley,
J. Lloyd Harshman.

Attys. for Stockholders:

Wagaman & Wagaman,
Doub,
Wachter,

Stonebraker,
Bostetter and
Baker.

Monday, July 8th, 1935

Counsel for Receiver offer in evidence—

Chapter 298 of the Acts of Maryland of 1902;
Chapter 215 of the Acts of Maryland of 1904;
Chapter 410 of the Acts of Maryland of 1908;
Certified copy of the Amendment to the Charter of the Bank, approved by the Bank Commissioner on Dec. 6, 1928.

"EXHIBIT NO. 1"

ARTICLES OF AMENDMENT OF THE ARTICLES OF INCORPORATION OF THE MARYLAND SURETY & TRUST COMPANY

THIS IS TO CERTIFY, That, at a meeting of the Board of Directors of the Maryland Surety and Trust Company, of Hagerstown, Maryland, held on the 23rd day of October, 1928, at which more than a majority of the said Board were present, a motion was duly made, seconded and unanimously carried, that the Board of Directors of the Maryland Surety and Trust Company of Hagerstown, Maryland, recommend to the stockholders of the Corporation,

(1) That the name of the Corporation be changed from "The Maryland Surety and Trust Company", to "The Hagerstown Bank and Trust Company";

(2) That the capital stock of the corporation be increased from Two Hundred Fifty Thousand Dollars ($250,000.00) to Five Hundred Fifty Thousand Dollars ($550,000.00) and that the number of authorized directors be increased to thirty and that the office of the chairman of the Board be created and the number of authorized Vice Presidents be increased to six; and that the Charter of the Corporation be amended to effect those results, and that a special meeting of the stockholders of the Corporation be called for the purpose of considering such recommendations of the Board, and taking such action thereon as may be deemed by them proper, in the premises.

That pursuant to a notice of a special meeting of the stockholders, sent to all of the stockholders of the Corporation in pursuance of the aforementioned action of the Board of Directors, and setting forth the objects of the meeting, as well as the time and place thereof, and giving the period of notice required by law, in the

premises, a meeting of the stockholders of The Maryland Surety and Trust Company of Hagerstown, Maryland, was duly held on the 30th day of November, 1928, at which the holders of more than two-thirds of the stock of the Corporation outstanding and entitled to vote were present; that at said meeting the aforementioned recommendation of the Board of Directors was duly read to the stockholders and by them considered; that thereupon, upon motion duly made, seconded and unanimously carried, it was resolved:

(a) That so much of Section One of Charter of Corporation of the Maryland Surety and Trust Company, as follows:

"..... shall and they are hereby constituted a body politic and corporate by the name and style of "The Maryland Surety and Trust Company" "..... be and the same is hereby changed to read as follows:

"..... shall and they are hereby constituted a body politic and corporate by the name and style of "The Hagerstown Bank and Trust Company....."

(b) That Section Two of the Charter of the Corporation as follows:

"Section 2. And be it enacted, that the capital stock of the said Company shall consist of Fifteen Thousand shares of the par value of ten dollars each, aggregating One Hundred and Fifty Thousand Dollars, with the privilege to said corporation to increase the same from time to time of Two Hundred and Fifty Thousand Dollars by a vote of a majority of the stockholders at its general meeting or at a special meeting to be called for that purpose, and the incorporators, or their successors or a majority of them shall have the power to open books for subscriptions at such times and places as they may deem expedient, and when a majority of such shares shall have been subscribed and ten per centum thereof has been paid in, the stockholders may elect directors not less than than ten and not more than twenty-two in number to serve until the next annual meeting or until their successors have been duly elected and qualified, and the Directors so elected by said Company and their successors, are hereby authorized and empowered to enjoy and exercise all the rights, powers and privileges which are intended to be hereby given, and whenever the capital stock shall be at any time increased, the stockholders at the time of such increase shall be entitled to subscribe to a pro rata share of said increase

on the payment of the price that may be fixed by the Board of Directors," ----------

be and the same is hereby changed and a new Section Two A be added, all of which shall read as follows:

"Section 2.—The total amount of the capital stock of the Company is Five Hundred Fifty Thousand Dollars ($550,000.00) divided into fifty-five thousand (55,000) shares of the par value of Ten Dollars ($10.00) each."

"Section 2A.—That the Company shall have not less than ten nor more than thirty directors."

The price to be paid for the new stock is Thirty-Five Dollars ($35.00) per share.

(c) That Section Three of the Charter of the Corporation as follows:

"Section 3.—And be it enacted, that the directors shall be elected annually by the stockholders on the Second Monday in January, and they shall elect from their number at the first meeting of the Board after their election, as prescribed by the second section of this Act, and after all subsequent elections, a president and two vice-president..., and shall also have power to elect a secretary and treasurer, and to appoint and employ such other officers, clerks and agents, as the business of said company from time to time requires; the election shall be by ballot, and at such elections and all meetings of stockholders every stockholder shall be entitled to one vote for every share of stock held by him, but no person shall be eligible as director who is not a stockholder to the amount of twenty-five (25) shares of stock."

be and the same is hereby changed to read as follows.

"SECTION 3.—That the directors shall be elected annually by the stockholders on the Second Monday in January, and they shall elect from their number at the first meeting of the board after their election, a Chairman of the Board, a President, Vice-Presidents, not to exceed six in number, and they shall also have power to elect or appoint a Secretary, Treasurer, and Trust Officer, and such other officers as they may deem necessary, who need not be members of the board, but no person shall be eligible as director who is not a stockholder to the amount of twenty-five (25) shares of stock."

That at said meeting of stockholders of the Mary-

land Surety & Trust Company, it was further resolved that a certificate be executed by the proper officers of the Corporation, as is hereby done, setting forth the said Amendments, of the Charter of the Corporation, and that such further action be taken in the premises by the proper officers of the Corporation as may be requisite to render the said Amendment effectual.

IN WITNESS WHEREOF, the President and Secretary of the Maryland Surety and Trust Company have hereunto affixed their signatures this 4th day of December, 1928, and certify that the foregoing resolutions were passed as above set forth, and the said President and Secretary have further acknowledged this Certificate of Amendment for and on behalf of said Corporation.

WM. P. LANE,
President of the Maryland Surety & Trust Company.

(CORP. SEAL)

EDWIN C. HOOK,
Secretary of the Maryland Surety & Trust Company.

STATE OF MARYLAND,
COUNTY OF WASHINGTON ss:

I hereby certify that on this 4th day of December, 1928, before me, the subscriber, a Notary Public of the State of Maryland, in and for Washington County, personally appeared William P. Lane, President of the Maryland Surety and Trust Company, and Edwin C. Hook, Secretary of said Bank, and on behalf of the Maryland Surety and Trust Company, each acknowledged the foregoing Certificate of Amendment as the act and deed of said Corporation.

Witness my hand and notarial seal.

(N. P. SEAL) Wm. E. Green, Notary Public.

CERTIFICATE OF APPROVAL OF
BANK COMMISSIONERS:—

I do hereby approve the foregoing Certificate of Amendment to the Charter of the Maryland Surety and Trust Company.

As witness my hand this 6th day of December, 1928.

George W. Page,
Bank Commissioner of the State of Maryland.

I, Frank G. Wagaman, one of the Judges of the Cir-

cuit Court of Washington County, Maryland, do hereby certify that the foregoing Certificate has been submitted to me for examination, and I do further certify that the said Certificate is executed in conformity with the law.

Frank G. Wagaman, Judge.

OPINION OF COURT

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| STATE OF MARYLAND | NO. 12,777 EQUITY |
| Vs. | IN THE CIRCUIT |
| HAGERSTOWN BANK | COURT FOR |
| & TRUST COMPANY, | WASHINGTON |
| A Body Corporate | COUNTY |

John J. Ghingher, Bank Commissioner, Receiver of the Hagerstown Bank and Trust Co., filed his petition wherein he states, that it is necessary in the liquidation of The Hagerstown Bank and Trust Co. that an assessment be made against all of the stockholders of that Company in an amount equal to the shares of stock respectively held by them. On this petition an order was passed, requiring each of said stockholders to pay to the said Receiver an amount equal to the par value of the share or shares of the capital stock of said Company held by him, unless cause to the contrary be shown. Notice was also required by said order to be given to each of said stockholders of the substance of the petition, together with a copy of the order. Answers were filed by numerous stockholders, denying the right of the Court to pass such an order. Hearing was had upon petition and answers, and such record evidence offered as was necessary to present the questions on their merits.

The Hagerstown Bank and Trust Co. was incorporated under the name of the Maryland Surety and Guaranty Co. by the Act of 1902, Chap. 298, the Charter amended by the Act of 1904, Chap. 215, and again amended and the name changed to Maryland Surety and Trust Company by the Act of 1908, Chap. 410. Later by amendment, under the general law, its name was changed to the Hagerstown Bank and Trust Co.

The Act imposing stockholders' liability on trust companies was Chap. 109 of the Acts of 1892, Sec. 85L. The measure of liability under this section being what is commonly known as triple liability, or an assessment in addition to the par value of shares originally of 200 per cent, which was reduced to a double liability, or an additional 100 per cent by Chap. 101 of the Acts of 1904.

All the legislation which distinguished the liability of the stockholders of banks and trust companies has been repealed, and the Act of 1910, Chap. 219, Code, Art. II, Sec. 72 is now applicable to both. The result is, there is now no difference as to rights and liabilities of stockholders in the two kinds of corporations.

What has been said in the opinion this day filed in the case of the Peoples Banking Company of Smithsburg, No. 12,277 Equity, is equally applicable to the questions presented by the petitions and answers in this case, and the opinion in that case is adopted as the opinion in this.

Anything which was there said with respect to the liability of stockholders, whether they be stockholders of record at the time of the receivership or stockholders who had transferred their stock before the receivership, is, if anything, more clearly said by Chap. 410, of the Acts of 1908, amending the Charter of the Hagerstown Bank and Trust Co., because there is incorporated in that Act these words, "The liabilities of the stockholders shall at all times be determined by the laws of the State in force at the time the said liabilities may attach." This provision is exactly the construction put upon the Constitutional provision Art. 3, Sec. 39, and the statutes passed in pursuance thereof, by the cases mentioned in the opinion of the Peoples Banking Company Case.

There is no point to any distinction between trust companies engaged in banking business and banks which are not engaged in a trust business. When a trust company engages in or is authorized to engage in and pursues the business of banking it is inescapably bound by the provisions of Sec. 39, of Art. 3, of the Constitution, and whether it be called a bank or a trust Company makes no difference if it is engaged in a banking business. The difference in liability under the Act of 1892 was an additional liability put upon banks which engaged in a trust business.

Further discussion of the facts and questions involved in this case, in view of the opinion in the other case, becomes unnecessary and the petition of the receiver filed on the 16th day of January, 1935, will be dismissed.

D. Lindley Sloan.

Filed July 27, 1935.

OPINION OF COURT

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| STATE OF MARYLAND<br>Vs.<br>THE PEOPLES BANKING COMPANY OF SMITHSBURG | NO. 12,277 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

On the 5th day of April, 1933, the Bank Commissioner was appointed Receiver of The Peoples Banking Company of Smithsburg, hereinafter called Bank, and its affairs are now in the hands of the said Commissioner for the purpose of liquidation.

On June 19, 1933 this Court passed an order and decree requiring "each stockholder of the Peoples Banking Company of Smithsburg, Maryland, to pay to John J. Ghingher, Bank Commissioner, Receiver for the said "Bank" an amount of money equal to the par value of the share or shares of the capital stock of the said — Bank held by him, and further ordering and authorizing the Bank Commissioner to proceed by law with the collection of the assessment so made.

On Feb. 15, 1935, a large number of persons who were stockholders of the Bank at the time of the appointment of a Receiver filed their petition praying that they be made parties defendant in the said proceedings. The prayer of this petition was granted. On the same day these new parties defendant filed their petition praying that the said order of June 19, 1933, be rescinded and revoked. The allegations of this petition and the answer of the Bank Commissioner thereto, raises the question of the constitutionality of Sec. 72 of Art. II of the annotated Code, and if it be held constitutional, its proper construction and effect.

The more material facts appearing from the testimony and stipulation filed in the case are as follows:

The Bank was incorporated under the general provisions of the law on the 24th day of February, 1910. Many of the petitioners were creditors of the Bank at the time of the appointment of the Receiver, as well as stockholders. Thirteen of these stockholders were such prior to June 1, 1910, the effective date of the Act of Assembly now appearing in the Code as above stated.

The liability of a stockholder of a corporation to be called upon to pay the debts of the Corporation is a liability founded upon contract.

Norris Vs. Wrenschall 34 Md. 499
Brant Vs. Echlen, 59 Md. 351
Coulbourn Vs. Boulton, 100 Md. 351
Steel Co. Vs. Equitable Soc. 113, Md. 80
Colton Vs. Mayer, 90 Md. 711

Republic Iron & Steel Co. Vs. Carlton 189 Fed. 130

In Norris Vs. Wrenschall, supra, page 500, it is said in an opinion by Judge Miller, that the stockholder's liability "is not in the nature of a penalty, like that in other sections, imposed upon the trustees, managers, directors or other officers of the corporation, for doing that which the statute expressly or by implication forbids, or omission to do something which the law directs to be done § § it is § § virtually and in effect a liability upon a contract and the mutual agreement of the parties, not indeed in form an expressed personal contract, but an agreement of equally binding obligation consequent upon and resulting from, the acts and admissions or implied assent of the parties". Or, as said by Judge Rose in Republic Iron & Steel Co. Vs. Carlton, supra, "In Maryland the liability of a stockholder to a creditor of a corporation is one founded on contract § § it follows that the plaintiff has a right to insist that the obligation of that contract shall not be impaired by subsequent legislation, nor may the State so change the remedy as substantially to impair or lessen the value of the contract."

Since the right of a creditor and the liability of a stockholder is founded on contract, and the contract is a creature either of the Constitution of the State or the valid statutes passed by the Legislature in pursuance of and in accordance with the Legislature's constitutional powers, it is necessary to examine first, the constitutional provisions.

Sec. 39 of Art. 3 of the Constitution is as follows:

"The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon, note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by law."

Since the adoption of the Constitution of 1867, there have been but two general statutes dealing with

the subject matter of Art. 3, Sec. 39. The first was Sec. 11 of Chapter 206 of the Acts of 1870, appearing in the Code of 1888 as Sec. 27 of Art. 11. The second was Sec. 68 of Chap. 219 of the Acts of 1910, appearing in the present Code as Sec. 72 of Art. 11.

The Act of 1870 Chap. 206, Sec. 11 is as follows:

"The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this article and every part of it may be altered from time to time, or repealed, by the Legislature."

This Act is in the identical language of Sec. 39 of Art. 3, of the Constitution, except that it includes the directors as well as the stockholders.

Chapter 338 of the Acts of 1852 authorized the formation of corporations for manufacturing purposes. Sec. 9 of that Act provided, "That all stockholders of every company incorporated under this Act shall be severally and individually liable to the creditors of the Company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company," **until** the whole amount of capital stock is paid in. In Matthews Vs. Albert, 24 Md. 527, the creditor of a manufacturing company sought to recover from a stockholder the double liability under the section quoted. It was held that the stockholder was liable for the debt of the corporation while he was a stockholder, but was not liable to a creditor who became such after his stock had been transferred. This case was decided in 1866.

In Norris Vs. Wrenschall, 34 Md. 492, a creditor of a manufacturing corporation sought to recover against a stockholder the double liability under Sec. 52 of Art. 26 of the Code of 1860, being the same statutory provision under consideration in the last mentioned case. The Court said: "We have also there (Norris Vs. Johnson, Ante page 485) determined that the extent of the liability of each stockholder is measured by the amount of stock held by him at the time the debt was contracted, continues at least until all the capital stock is paid in, and is in no wise affected by the amount thereof that may at any time remain unpaid. There is no provision in the Code by which this liability is made dependent

upon any other contingency than the contracting of the debts by the corporation, whilst the defendant was a stockholder, and before the capital stock is fully paid up. These two conditions make the liability determinate and irrevocable."

Hager Vs. Cleveland, 36 Md. 476, was the same character of case as the one last mentioned. The Court says: "This brings us to the second ground of defense; whether the transfer of stock by the appellant, exonerates him from personal liability for the debt contracted when he was a stockholder and before the whole capital stock was paid in."

"The language of Sec. 52, it must be admitted, is general in its terms, and does not in words declare whether the individual liability shall attach to such as are stockholders at the time the debt is contracted, or to those holding stock at the time the suit was brought. It is obvious, however, that the protection of the creditor was the paramount object the Legislature had in view, and the section in question, ought to receive such a construction as will best accomplish this object." The Court later quoting from Norris Vs. Wrenschall, supra says: "It is a debt under the statute due from the stockholder to the creditor, spring out of and co-existent with the contract between the corporation and the creditor," (Colton Vs. Mayer 90 Md. 717), and then says: "If so, it be a debt due from the stockholder to the creditor coexistent with the contract by the company, it is clear that no act by the stockholder without the consent of the creditor can exonerate him from the liability thus incurred. The relation of stockholder creates a perfect legal obligation to pay the debts contracted by the company, and it is upon the faith of this perfect legal obligation that parties deal with the company. The liability of the stockholder, being therefore, in the nature of a contract made between the company, the creditor and himself, we are of opinion that it continues and **is in no manner affected by the mere transfer of his stock.** (Bold face ours). This construction is fully warranted by the language of the statute and best accomplishes the purpose of the Legislature, namely, the protection and security of creditors".

In Weber Vs. Fickey, 47 Md. 196, the Court was construing the liability of a stockholder under Sec. 59 of Chap. 325 of the Acts of 1872, the statute being similar to the one in the aforegoing cases. In passing upon a demurrer to the declaration in a suit at law the Court

says: "Another defect in the declaration is the omission to allege that the defendant was a stockholder at the time the debt sued for was contracted. It is not sufficient that he should have become one afterwards or was so, at some time prior to the date of the credit given, he must have been a stockholder at the time, Hager Vs. Cleveland, 36 Md. 476, and this is as essential to the right of recovery against him as the fact that there is an amount of his subscription still unpaid. It is as necessary to aver the one as the other, and the omission of either averment from the declaration is a fatal defect."

In Hammond Vs. Straus, 53 Md. the Court had under consideration the liability of a stockholder of a banking corporation to a creditor of the bank. The provisions of the charter of the bank with respect to this liability are contained in Sec. 14 of Chap. 118, of the Acts of 1874, and are identical in language with the constitutional provisions heretofore referred to, with the addition of "directors" to "stockholders", and with the Act of 1870, Chap. 206, Sec. 11, heretofore referred to. The Court announced, "To entitle the plaintiff (creditor) to recover in this action it was essential that three things should be made to appear: 1. That a corporation, such as that alleged should have been created; 2. That the defendant was a stockholder therein; and 3. That the plaintiff was a creditor of the corporation and that he became such while the defendant was a stockholder", and Judge Boyd said in Murphy Vs. Wheatley, 102 Md. 501, 517,

> "If depositors and other creditors become such before stockholders occupying that relation to the company they cannot say that they relied on those persons for additional security, or had any right to look to them, for they were not then, and might never become stockholders. But under the rule adopted by this Court, they can if they choose, ascertain who the stockholders are when the debts are contracted."

In Colton Vs. Mayer, 90 Md. 711, the Court considered the rights of creditors and the liabilities of stockholders under the provisions contained in the Charter of the South Baltimore Bank. The suit was by receivers against a stockholder. The charter fixed the rights of the creditor and the obligations of the stockholder in the identical language of the Constitution, except that it added "directors," to the stockholders. The Court reaffirmed Hammond Vs. Straus, supra, and went on to

say: "In as much as this charter does not authorize the receivers to sue, the test of their right to do so is to ascertain whether it gave the corporation any property or estate in this liability of the stockholders, or in any manner made it an asset of the bank, for, unless it did, it is clear that they cannot maintain this suit against the defendant on the mere ground that he was a stockholder. Then the charter says, that the stockholders and directors of this corporation shall be liable to the amount of their respective shares of stock for all of its debts and liabilities", to whom were they to be so liable? Clearly not to the corporation for its own debts and liabilities, but manifestly they were to be liable to the creditors". And the Court further says: "There was no liability of any kind to the corporation, by reason of this provision in the charter, and at no time from its organization to its dissolution could it have demanded one penny from the appellee on account of it."

Murphy Vs. Wheatley, 102 Md. 501, was a suit to enforce the triple liability of stockholders in a trust company under Sec. 85 L of Art. 23 of the Code Act of 1892, Chap. 109, and it was there held that a stockholder was not liable to a creditor who became such before the ownership of the stock, a liability denied by the Circuit Court. In that case the opinion by Judge Boyd says: "We are aware that many courts—perhaps a majority of those in this Country—have held to the contrary, but the decisions of this Court unquestionably sustain that answer of the lower Court. It is to be regretted if this construction of the statute will cause such difficulties as are suggested by the appellants (of accounting, collection and apportionment), but even such results would be preferable to the risk of doing manifest injustice to those who became stockholders during the closing days of this company. And on page 518, it is said, "The liability, in this respect, is well settled in the State in the earlier cases. They held that the extent of the liability was measured by the amount of stock held by the stockholders **at the times the debts were contracted,** and stockholders were not liable for debts contracted **before** they became such". If this is not the law now, then the stockholders' liability is a penalty and is not contractual. To hold that this liability is a penalty for owning stock the day the bank closes would be not only to overrule the decisions, but to repudiate the interpretation given the constitutional provision (Art. 3 Sec. 39) by Judge Alvey in Hammond Vs. Straus 53 Md. 1, and by Judge Boyd in Colton Vs. Mayer 90 Md. 711.

The cases from which we have quoted, and to which we have referred, firmly establish the principle upon which stockholders are held liable to creditors in Maryland. Some of these cases have considered statutes wherein the language was similar to the language of the Constitution. Others have considered language identical with the language of the Constitution. One of them was decided before the adoption of the Constitution. None of these cases has ever been overruled, nor its authority questioned. From them we think it clearly decided that Sec. 39 of Art. 3 of the Constitution requires the Legislature to give to creditors of Banks, and to impose upon stockholders of banks the following rights and obligations respectively. First: To give to creditors and impose upon stockholders direct and immediate responsibility to be enforced between themselves. Second: To give the creditor the right to pursue a stockholder, and to place upon the stockholder a liability for the debts of the bank incurred while the stockholder was such. Third: The right of the creditor and the responsibility of the stockholder to continue, notwithstanding the stockholder transfers his stock. And fourth: The liability of the stockholder to be an asset of the creditor and not an asset of the corporation. It does not require the Legislature to impose liability on a stockholder for any debts except those attaching while the stockholder is such.

These rights of creditors against stockholders, which the Constitution requires the Legislature to give them, are property. If these rights are property it is not within the power of the Legislature to take them away. As stated in Mister Vs. Thomas, 122 Md. 445-457, "It is not, therefore, within the power of the Legislature to have exempted the stockholders of such a corporation from the obligations imposed by Sec. 39 of Art 3 of the Constitution." This liability in order to be unassailable, must be a property right, and if so available to creditors against stockholders who were such when the debt was created. If this is not true then the only alternative is to declare it to be a penalty. If a penalty the stockholder, if he sees a bank's failure ahead may rid himself of stock in any way he choses, no matter what his motive may be, and he can thus free himself of liability. If the transfer be in fraud of any one's right, it must be a property right. There can be no fraud in ridding oneself of a penalty.

It is in the light of these principles, and in that light

alone, that we are bound to approach the consideration of Sec. 72, of Art. 11 of the Code.

There is no prohibition in the Constitution against giving creditors of banks rights or imposing upon stockholders obligations greater than required by the Constitution. Murphy Vs. Wheatley, supra. But, when we come to consider the only other Act relating to the rights of creditors against stockholders of Banks, to wit, Sec. 72 of Art. 11 of the Code, we are bound to assume the Legislature intended to obey the Constitutional Mandate to it; for it would ill become the Court to charge a coordinate branch of the State Government with a wilful disobedience of the will of the people as expressed in the fundamental law. If, therefore, Sec. 72 of Art. 11 of the Code is found to give to creditors the rights, and to impose upon stockholders the liabilities required by the Constitution, it will be no objection to find that it gives greater rights to creditors and imposes greater liabilities upon stockholders. However, if the Section of the Code under consideration is found to give only one right to creditors and impose one liability upon stockholders, then, if by any reasonably possible construction the Act can be held to comply with the Constitutional Mandate, it must be so held. And if the Section in question is found to undertake to deny creditors the rights guaranteed to them by the Constitution, it must be held to contravene Sec. 10 of Art. 1 of the Federal Constitution, as well as the Fourteenth Amendment thereto, and in addition thereto the 23rd Article of our own Bill of Rights. Md. Jockey Club Vs. State 106 Md. 413-Hawthorne Vs. Calef 2 Wall 10-21.

Sec. 72 of Art. 11 of the Code purports to provide but one fund for the benefit of creditors of banks. It purports to impose but one obligation upon stockholders. We think its provisions can reasonably be construed as complying with the provisions of the Constitution. Any other construction would mean that every State bank organized under the general law would be unlawfully operating because of the absence of the requirement of Art. 3 Sec. 39 of the Constitution. That provision must be fastened on every bank chartered by this state.

The Constitution provides that stockholders shall be liable for "all debts etc." The Act of 1870 used the same language. The charter in Hammond Vs. Straus, supra, repeated it. The statute in Murphy Vs. Wheatley, supra, also repeated it. The Charter in Colton Vs. Mayer supra, did likewise. These cases determined that the

liability for "all debts etc." meant debts attaching at the time the stockholders were such irrespective of any subsequent transfer of the stock. When, therefore, the Legislature in 1910 in the section under consideration again repeated the identical language "all debts etc." which had been given a very definite meaning by the cases referred to, it must be held to have intended the meaning already given it, unless a different meaning is forced by a different context. There is nothing in the Section of the Code under consideration that compels a different interpretation of the language. The "debts" to be benefited by the liability imposed under all the cases were not the debts which might be owing upon the insolvency of the bank. As to each stockholder they were the "debts" attaching during the time he was such.

The "stockholders" to be liable were designated in the charters in the cases cited, as well as in the constitutional provision, by the same language as they are designated in Sec. 72 of Art. 11. The Legislature therefore must have meant the same class of individuals as was determined to be included within that description in the language used in the cases. And "stockholders" as defined in the section must therefore be held to be the stockholders at the time of the creation of the debt for which the liability is sought to be enforced, irrespective of the transfer of their stock.

Not only is there no indication in this section that it was intended to make liable only stockholders of record at any time of the insolvency of the bank, but it affirmatively appears by the repetition of the language already interpreted as intended not to do so.

Beginning with the Act of 1892, Chap. 109, there are many statutes fixing the liabilities of stockholders of trust, guaranty and other corporations, as to which the Constitution contains no provision. In every one of those Acts the rights of pre-existing creditors are reserved. Likewise in Sec. 72 of Art. 11, the pre-existing rights of creditors of trust companies are reserved. As to creditors of banks there is no such reservation. As to banks the only previous statute was the Act of 1870, which, as has been said, was in the language of the Constitution. From this failure, in the Act of 1910, to reserve the pre-existing rights of Creditors of banks, the only logical conclusion is that the Legislature did not, by that statute, intend to make any change in those rights; but intended only to provide a different procedure for their enforcement.

This view further confirms us in our conclusion that the rights of creditors of banks under the Act of 1910 are identical with those rights under the Act of 1870, and that the Act of 1910 was intended by the Legislature to be construed exactly as was the Act of 1870, except so far as the Act of 1910 provides a different method of procedure.

Section 72 of Art. 11 of the Code provides that the liability of stockholders shall be an "asset of the corporation". If by that language it is meant that this liability is for the benefit of all the creditors of the Corporation, irrespective of the views we have heretofore expressed, then, in our view, it would be in violation of the Constitutional rights of creditors of the bank. If, on the other hand, it is held to mean that the liability of the stockholder is an asset of the corporation to be distributed by it or its receiver to the creditors according to their rights as heretofore defined, and we so construe it, then it merely provides for a more equitable distribution of the liability imposed for the benefit of creditors, and prevents multiplicity of suits among stockholders for contribution. This construction does no violence to the rights of creditors and the statute thus construed is not rendered inconsistent with our State or Federal Constitutions.

Miners & Merchants Bank Vs. Snyder 100 Md. 57.

Mister Vs. Thomas, 122 Md. was decided after the Act of 1910, but the receivers who brought the suit were appointed in 1907. The Farmers Trust, Banking and Deposit Co. for whom the receivers were appointed, were subject to the provisions of the Act of 1904, which was an amendment to Chaps. 192 and 279 of Act of 1892, by which the stockholders were bound by Sec. 11 of the Charter. The order of the lower Court directed the receivers to bring suit against stockholders "who would in any way be liable for the debt of the said Company." There was nothing in this order limiting the liability to stockholders of record of the day of the receivership, from which it might be inferred that the Chancellor contemplated the possible liability of former stockholders. Nor did the Court of Appeals in the opinion by Judge Burke in terms say it was an asset of the corporation. What he did say (p 458) was, that it was "to be treated as an asset of the corporation and enforced by the receivers under the order of that Court." The views we have hereinbefore stated are therefore in no way inconsistent with this case.

We have hereinbefore stated that the liability of a stockholder of a bank is an "asset of the corporation" only in the sense that it may be collected by the receiver for the benefit of those creditors who became such while the stockholders against whom the liability is enforced, were such. In so determining we found that Sec. 72 of Art. 11 of the Code was intended to be a performance by the Legislature of the Constitutional Mandate and no more. It follows as a necessary result that stockholders who are also creditors are equitably entitled to set-off the debt of the bank to them against the stockholders' liability. Such a ruling is necessary to sustain the constitutionality of the statute, and is a reasonable construction of it.

In Cahill Vs. Original Big Gun Asso. 94 Md. 353, the Court allowed the set-off because the charter considered that case required it. The pertinent provisions of the charter are in the identical language of the Constitution except that "directors" is added to stockholders against which liability is imposed. The Charter considered is the one, the effect of which was construed in Colton Vs. Mayer, supra. Strauss Vs. Denny, 95 Md. 690 reaffirmed this decision.

In the discussion of this case we are not unmindful of two recent cases in the Court of Appeals holding stockholders liable to assessment, but neither of them says what stockholders are liable, nor for the benefit of what creditors was there such liability. Those cases were heard and decided on the theory of liability, and the constitutional provision was not under attack.

In the case of Lange Vs. Ghingher, 168 Md.—178A 116, the question presented and decided was whether the stockholders of the American Trust Company were relieved of their statutory liability because of an agreement whereby management of the bank had been taken over by another bank, with other banks agreeing to share in any shortage in the liquidation of the insolvent bank.

In the case of Robinson Vs. Hospelhorn, 168 Md.—, Daily Record June 27, 1935, the decision was that the stockholders' liability was primary, and that the assessment of the stockholders' liability did not need to await the liquidation of the bank's assets and that the assessment was not required to be delayed until the liquidation of the bank's assets by a liquidating corporation to which the assets of the bank had been transferred under an assignment by which it had until July 1, 1938 to con-

vert such assets. These were the only questions submitted, argued and decided in that case. The questions submitted were so limited by the following stipulation in the record of that case;

> "It is intended that all other questions, including the questions of insolvency, vel non, and the extent thereof, the status of subscribers to the guaranty fund, and the question as to the liability of particular stockholders for debts created before they became such, or after the bank passed into the control of the Bank Commissioner, and all other relevant questions are reserved for the future determination of the Court, as being unnecessary for present decision."

The fact that it has been the practice under the National Banking Act (U. S. Rev. St. Sec. 5151) to impose this liability upon all stockholders of record of the date of the receivership is neither precedent nor authority in this State. The Constitution of the United States is silent on the subject, and the statute is merely a banking regulation. In 7 C. J. 769 Sec. 606, it is said: This liability is created for the sole benefit of creditors, and is held to arise purely by force of statute and not to be contractual in its nature". In this State the very existence of a bank is contingent upon its being subject to a stockholder's liability in addition to the payment for the stock, and this liability has been declared in all of the cases cited to be contractual in its nature and enforceable in the manner provided. It is not an arbitrary exercise of power by the Legislature, but a contractual obligation, which is a condition precedent to the conduct of a banking business by a corporation. Plaintiff's counsel have cited numerous cases to the effect that this is an arbitrary power in the Legislature, and that the liability is in the nature of a special or trust fund for the security of creditors generally. Our decisions are upon the theory, and they have so construed the language of our Constitution, (Hammond Vs. Straus, supra and Colton Vs. Mayer, supra), and there is individually responsibility of the stockholder to the creditor who became such during such individual stockholding, and that this liability is not ended by the transfer of his stock, and this is in line with the last clause of the constitutional provision which reads, "The books, papers and accounts of all banks shall be open to inspection, under such regulations as may be prescribed by law", and with what was said by Judge Boyd, already quoted, from Murphy Vs. Wheatley, supra.

All irregularities, if any, as to the time and method of presenting to the Court the matters herein considered were waived by the solicitors for the respective parties, and the questions submitted on their merits.

The order and decree of June 19, 1933, will be rescinded and revoked.

D. LINDLEY SLOAN,
FRANK G. WAGAMAN.

Filed July 27, 1935.

## DECREE

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| STATE OF MARYLAND<br>Vs.<br>THE HAGERSTOWN BANK AND TRUST COMPANY | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY<br>IN EQUITY |

Decree

The matter of the petition of John J. Ghingher, Bank Commissioner, Receiver of The Hagerstown Bank and Trust Company, heretofore filed in this cause on the 16th day of January, A. D., 1935, seeking an assessment against the stockholders of said Bank, the answers of various stockholders thereto, the evidence, stipulations and all other matters for the debts thereof having been read and considered, and counsel for the respective parties having been heard, it is thereupon this 31st day of July, A. D., 1935, by the Circuit Court for Washington County, pursuant to and in conformity with the opinion heretofore filed in this cause on the 27th day of July, A. D., 1935, adjudged, ordered and decreed that the aforesaid petition be and the same is hereby dismissed, without prejudice to such further proceedings as the receiver may be advised are proper and in accordance with the opinion heretofore filed.

D. Lindley Sloan.

Filed July 31, 1935.

## PETITION FOR AUTHORITY TO TAKE APPEAL AND ORDER OF COURT THEREON.

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| STATE OF MARYLAND<br>Vs.<br>HAGERSTOWN BANK & TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT COURT FOR WASHINGTON COUNTY |

To the Honorable, the Judges of said Court:

The petition of John J. Ghingher, Bank Commissioner, Receiver for the Hagerstown Bank and Trust Company, Respectfully represents:

1.—That heretofore on the 16th day of January, A. D., 1935, your petitioner filed in this cause a petition seeking an assessment against the stockholders of The Hagerstown Bank and Trust Company of an amount equal to the par value of the shares of stock held by such stockholders for the benefit of the creditors of said Hagerstown Bank and Trust Company.

2.—That pursuant to an opinion filed in this cause by your Honorable Court on July 27, 1935, a decree was passed by your Honorable Court on the 31st day of July, 1935, dismissing the said petition.

3.—That your petitioner feels aggrieved by said decree of your honorable Court and in view of the large number of persons whose rights are affected by the said determination of your Honorable Court desires to take an appeal from said decree to the Court of Appeals of Maryland.

4.—That by order heretofore passed by your Honorable Court Messrs. J. Lloyd Harshman and Robert H. McCauley were appointed special counsel for your petitioner in all matters affecting or growing out of the question of stockholders' liability, and that said attorneys have recommended that an appeal be taken as hereinabove set forth.

Your petitioner therefore prays your Honorable Court to pass an order authorizing and empowering him to take an appeal from the decree hereinabove mentioned.

Respectfully submitted,
ROBT. H. McCAULEY,
J. LLOYD HARSHMAN,
Special Counsel for Receiver.

Upon the aforegoing petition it is this 3rd day of August, A. D. 1935, by the Circuit Court for Washington County, sitting in Equity Ordered and Decreed, That John J. Ghingher, Bank Commissioner of the State of Maryland, Receiver for The Hagerstown Bank and Trust Company, be and he is hereby authorized and empowered to take an appeal to the Court of Appeals of Maryland from the decree filed in this cause on July 31, 1935, as mentioned in the aforegoing petition.

FRANK G. WAGAMAN.

Filed August 3rd, 1935.

## ORDER FOR APPEAL

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| STATE OF MARYLAND<br>Vs.<br>HAGERSTOWN BANK<br>& TRUST COMPANY,<br>A Body Corporate | NO. 12,777 EQUITY<br>IN THE CIRCUIT<br>COURT FOR<br>WASHINGTON<br>COUNTY |

Mr. Edward Oswald, Clerk:

Please enter an appeal to the Court of Appeals of Maryland from the final decree in this cause dated the 31st day of July, A. D. 1935, dismissing the petition of John J. Ghingher, Bank Commissioner, Receiver for The Hagerstown Bank & Trust Company, filed on the 16th day of January, A. D. 1935, for the purpose of determining and enforcing the liability of stockholders for the benefit of creditors.

ROBT. H. McCAULEY,
J. LLOYD HARSHMAN,
Special Counsel for Receiver.

Filed Aug. 5th, 1935.

## DOCKET ENTRIES

Bill in Equity for a Receiver filed Dec. 3rd, 1934;

Complaintant's Exhibit No. 1, filed Dec. 3rd, 1934;

Answer of Hagerstown Bank & Trust Company, a Body Corporate filed Dec. 3rd, 1934;

Decree passed and filed Dec. 3rd, 1934, appointing John J. Ghingher, Bank Commissioner of the State of Maryland, Receiver;

Bond filed and approved Dec. 3rd, 1934;

Petition of Receiver for Determination of Liability of Stockholders and Order of Court thereon filed Jany. 16th, 1935;

Petition & Order of Court thereon authorizing Receiver to employ Special Counsel in the matter of Stockholders' liability filed Feby. 25th, 1935;

Answer of W. P. Wachter filed March 28th, 1935.

Answer of Evelyn M. Wachter filed March 28th, 1935.

Answer of Ella B. Young filed March 28, 1935;

Answer of Mildred L. (Wachter) Fiery filed March 28, 1935;

Answer of F. Sydney Cushwa to Petition of John J.

Ghingher, Receiver & Order of Court thereon filed Mar. 28th, 1935;

Answer of Susan F. Cushwa to Petition of John J. Ghingher, Receiver & Order of Court thereon filed Mar. 28th, 1935;

Answer of Sarah R. Hoffman, Executrix, to Petition of John J. Ghingher, Receiver and Order of Court thereon filed Mar. 28th, 1935;

Answer of Anna Elizabeth Miller to Petition of John J. Ghingher, Receiver & Order of Court thereon filed Mar. 28th, 1935;

Answer of Ida M. Newcomer to Petition of John J. Ghingher, Receiver & Order of Court thereon filed Mar. 28, 1935;

Answer of Ida M. Newcomer & Joseph W. Howe, Executrix and Executor, to Petition of John J. Ghingher, Receiver and Order of Court thereon filed Mar. 28th, 1935;

Answer of John E. Stonebraker, Admr. d. b. n. to Petition of John J. Ghingher, Receiver & Order of Court thereon filed Mar. 28th, 1935;

Answer of Julia Hamilton Briscoe, Trustee in Equity Cause No. 8761 filed Mar. 28th, 1935;

Answer of Julia Hamilton Briscoe filed Mar. 28, 1935;

Answer of Wm. H. Miller filed Mar. 28th, 1935;

Answer of Nora Miller Baker filed Mar. 28, 1935;

Answer of C. Walter Baker filed Mar. 28th, 1935;

Answer of Gladys K. Bostetter to the Petition of John J. Ghingher, Bank Commissioner and to the order of Court to show cause why the stockholders' assessments should not be made final filed Mar. 28th, 1935;

Answer of Crystal Bostetter Hershey to the Petition of John J. Ghingher, Bank Commissioner and to the Order of Court to show cause why the stockholders' assessments should not be made final filed Mar. 28th, 1935;

Answer of Martin V. B. Bostetter to the Petition of John J. Ghingher, Bank Commissioner and to the Order of Court to show cause why the stockholders' assessment should not be made final filed Mar. 28, 1935;

Answer of John S. Kausler showing cause against imposition of double stock liability and Affdt. thereto filed Mar. 28, 1935;

Answer of Ardella M. Newcomer filed Mar. 28, 1935;

Receiver's Report and Statement of Assets and Liabilities in connection with the assessment of stockholders filed June 21st, 1935;

Opinion of Court filed July 27, 1935;

Decree passed and filed July 31, 1935;

Petition for Authority to take Appeal & Order of Court thereon filed August 3, 1935;

Order for Appeal filed Aug. 5th, 1935.

STATE OF MARYLAND,
WASHINGTON COUNTY, to wit:

I, Edward Oswald, Clerk of the Circuit Court for Washington County, do hereby certify that the aforegoing is truly taken from the Record of Proceedings in the above entitled cause.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of the Circuit Court for Washington County at Hagerstown, this 16th day of August, A. D. 1935.

EDWARD OSWALD, Clerk.

Approved as the record in the appeal of the above entitled case to the Court of Appeals of Maryland.

ROBT. H. McCAULEY,
J. LLOYD HARSHMAN,
Special counsel for Receiver,
Appellant.

JOHN WAGAMAN,
CHARLES F. WAGAMAN,
MARTIN V. B. BOSTETTER,
W. P. WACHTER,
C. WALTER BAKER,
LEVIN STONEBRAKER,
Attorneys for Appellees.

[fol. 50] IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1935

No. 62

JOHN J. GHINGHER, Bank Commissioner, Receiver for The Hagerstown Bank and Trust Company,

vs.

THE STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY, a Body Corporate

DOCKET ENTRIES

Appeal from the Circuit Court for Washington County. Filed August 29, 1935.

January 22, 1936. Decree reversed, and cause remanded, with costs to the appellant.

Opinion filed. Per Curiam.

February 20, 1936. Decree filed.

February 20, 1936. Motion for reargument filed.

April 15, 1936. Motion for reargument overruled.

Bill of costs omitted in printing.

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[fol. 51] IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1935

No. 62

JOHN J. GHINGHER, BANK COMMISSIONER, ETC.

vs.

THE STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY

OPINION—Filed January 22, 1936

Per CURIAM:

In this case, on facts similar to those stated in the opinion filed in the case of Ghingher, Receiver, v. Stockholders of the People's Banking Company of Smithsburg, (No. 61,

October Term, 1935), the same question of law have been presented, and the conclusions are necessarily the same.

For the reasons stated in that opinion, therefore, the decree below will be reversed, and the cause remanded for further proceedings in accordance with that opinion.

Decree reversed, and cause remanded, with costs to the appellant.

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[fols. 52 & 53] IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1935

No. 62

JOHN J. GHINGHER, BANK COMMISSIONER, ETC.

vs.

THE STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY

DECREE—Filed February 20, 1936

The Appeal in the above entitled case, standing ready for hearing, was argued by counsel for the respective parties, and the proceedings have since been considered by the Court.

It is thereupon on this 19th day of February, 1936, by the Court of Appeals of Maryland, and by the authority thereof, adjudged, ordered and decreed that the decree dated July 31st, 1935, of the Circuit Court of Washington County be and the same is hereby reversed, and cause remanded, with costs to the appellant.

Carroll T. Bond, Chief Judge for the Court.

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[fol. 54] IN COURT OF APPEALS OF MARYLAND

ORDER ALLOWING APPEAL—Filed July 13, 1936

And now, to wit, on July 13th, 1936, it is Ordered, That an appeal from the Court of Appeals of the State of Maryland to the Supreme Court of the United States be allowed as prayed upon the filing of a bond for costs in the sum of Five Hundred ($500.00) Dollars with good and sufficient

security, and the United States Fidelity and Guaranty Company is accepted as surety on said bond and said bond is now approved.

Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland.

[fols. 54½-56] [File endorsement omitted.]

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[fol. 57] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENTS OF ERROR—Filed July 16, 1936

Now come Julia Hamilton Briscoe, et al., appellees in the Court of Appeals of Maryland, petitioners in the Circuit Court for Washington County, Maryland, and hereinafter called "appellants" and for their assignment of errors show:

1. That the Court of Appeals of Maryland erred in holding valid and constitutional said section 72 and in holding that said Statute imposed upon the appellants a liability as holders of bank stock different from the contractual liability assumed by said appellants under the long established and well settled law of Maryland at the time of their respective purchases of shares of stock and thereby impaired the obligation of the contract entered into by said appellants contrary to Section 10 of Article 1 of the Constitution of the United States, and deprived them of property without due process of law contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States in the following respects:

A. By rendering them liable as stockholders of record for all the debts of the bank irrespective of the times when stock was purchased and the times the bank's debts were incurred, contrary to the long established and well settled law of Maryland, prior to the instant case, that stockholders of banks are liable under the aforesaid section 39 of Article 3 of the Constitution of Maryland and previous statutes only for debts incurred by the bank while they [fol. 58] were stockholders.

B. By rendering them liable to the Receiver of the particular bank, contrary to the long established and well settled law of Maryland prior to the instant case, that stockholders of banks are liable under the aforesaid section 39 of Article 3 of the Constitution of Maryland and previous statutes, only to the creditors thereof, and thereby deprived them of the right to set off against their respective liability what, if any, debt was due them from the bank as was by said long established and well settled law of Maryland prior to the instant case, permitted in suits against them by individual creditors.

2. That the Court of Appeals of Maryland erred in holding valid and Constitutional said Section 72 and in holding that said statute imposed liability only upon stockholders of record contrary to the long established and well settled law of Maryland at the time of the making of deposits in said bank by the appellant depositors and creditors of said bank, and thereby deprived them of property without due process of law contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States and impaired the obligation of their contract with the stockholders contrary to Section 10 of Article 1 of the Constitution of the United States.

A. By depriving the appellant depositors and creditors of said bank of their contractual right and all remedy to recover against stockholders who were such at the time their respective deposits were made or the bank became otherwise indebted to them, but who are no longer stockholders thereof, contrary to the long established and well settled law of Maryland prior to the instant case, that the liability of the stockholders under the aforesaid section 39 of Article 3 of the Constitution of Maryland and previous statutes for any debt of the bank incurred while they were stockholders was in no manner affected by the mere trans- [fol. 59] fer of their stock.

3. That the Court of Appeals of Maryland erred in limiting liability to stockholders of record, contrary to the long established and well settled law of Maryland prior to the instant case that the language of the aforesaid Section 39 of Article 3 of the Constitution of Maryland and previous statutes imposed upon stockholders of banks a con-

tractual liability for only such debts of the bank as were incurred while they were stockholders from which liability they were not discharged by the mere transfer of their stock, and thus only by a misconstruction of said Section 72 does the same impair the obligation of contracts of these appellants and deprive them of property without due process of law.

Wherefore, the appellants pray that the said decree of the Court of Appeals of Maryland made and entered on February 20, 1936, be reversed and that said Court may be directed to enter a decree in favor of the appellants.

Respectfully submitted, Levin Stonebraker. John Wagaman. Charles F. Wagaman. Martin V. B. Bostetter. E. Walter Baker. David W. Doub.

[fol. 59½] [File endorsement omitted.]

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[fols. 60 & 61] Bond on Appeal for $500.00, approved and filed July 13, 1936; omitted in printing.

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[fol. 62] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

STIPULATION FOR RECORD TO SUPREME COURT OF THE UNITED STATES—Filed August 12, 1936

It is hereby stipulated and agreed that the record on appeal to the Supreme Court of the United States from the Court of Appeals of Maryland shall consist of the follow-
[fol. 63] ing:

12. That there shall also be included in the record to be transmitted to the Clerk of the Supreme Court of the United States the attached stipulation marked "Additional Stipulation".

## Additional Stipulation

It is hereby stipulated and agreed by and between the respective parties to this appeal that:

1. That the parties appealing from the Court of Appeals of Maryland to the Supreme Court of the United States had on the date of the closing of the Hagerstown Bank and Trust Company and continuously to the present time deposits in said Bank and that said appellants were and still are creditors of said Bank in the following amounts:

| | |
|---|---|
| F. Sydney Cushwa | $ 83.83 |
| Susan F. Cushwa | No balance |
| Nora Miller Baker | No balance |
| C. Walter Baker | No balance |
| Gladys K. Bostetter | 243.76 |
| Crystal Bostetter Hershey | 1.48 |
| Ardella M. Newcomer | 122.42 |
| Julia Hamilton Briscoe | 1,914.73 |
| Julia Hamilton Briscoe, Trustee | 4,965.52 |

2. That some of the shares of stock outstanding at the time of the closing of the Hagerstown Bank and Trust Company were transferred to the record stockholders thereof who are parties appellant herein at a time after [fol. 64] some of the deposits were made and some of the liabilities incurred which were at the time of its closing and now are part of the obligations of said Bank.

3. That the parties appellant in this cause on the respective dates shown by the docket entries, filed answers in the Circuit Court for Washington County, substantially identical to the answer of John S. Kausler set forth at length in the record and that the Supreme Court of the United States shall take and consider the said Answer of John S. Kausler as the Answer of the respective parties appellant herein.

C. Walter Baker, Charles F. Wagaman, John Wagaman, Martin V. B. Bostetter, David W. Doub, Levin Stonebraker, Attorneys for Appellants.
J. Lloyd Harshman, H. McCauley, Attorneys for Appellee.

[fol. 65] Clerk's certificate to foregoing transcript omitted in printing.

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IN SUPREME COURT OF THE UNITED STATES

[fol. 66] STATEMENT OF APPELLANTS OF THE POINTS OF LAW WHICH THEY INTEND TO RELY AND THE PARTS OF THE RECORD NECESSARY FOR CONSIDERATION OF THE SAME—Filed August 20, 1936

A. Points of Law

1. That section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland is invalid and unconstitutional, because it imposes upon the appellants as holders of stock in the above mentioned bank, a liability different from the contractual liability assumed by said appellants and imposed upon them under the Constitution of Maryland and under the long established and well-settled law of said State at the time of their respective purchases of shares of stock of said bank and thereby impairs the obligation of the contracts entered into by said appellants contrary to section 10 of Article 1 of the Constitution of the United States and thereby deprives them of property without due process of law contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States:

(a) In that said section 72 renders the appellants liable for all debts of the bank irrespective of the times when their said stock was acquired and the times the bank's debts were incurred, contrary to their said contract and the long established and well-settled law of Maryland that stockholders in banks are liable under section 39 of Article 3 of the Constitution of Maryland and statutes passed pursuant thereto and in accordance therewith only for debts incurred by the bank while they were stockholders;

[fol. 67] (b) And in that said section renders the appellants liable to the Receiver contrary to the long established and well settled law of Maryland that stockholders of banks are liable under their said contracts and under

the aforesaid section 39 of Article 3 of the Constitution of Maryland and statutes passed pursuant thereto and in accordance therewith only to the creditors of said Bank and thereby deprives the appellants of the right to set off against their respective liability what, if any, debt was due them from the Bank, to which set off they were entitled by said contract under the long established and well-settled law of Maryland.

2. That said section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland is invalid and unconstitutional because it deprives the appellants of property without due process of law contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States and because it impairs the obligation of their contracts made between stockholders and creditors of the above named Bank contrary to section 10 of Article 1 of the Constitution of the United States, by limiting liability to stockholders of record and depriving the appellant depositors and creditors of said Bank of their contractual right and all remedy to recover against stockholders who were such at the time their respective deposits were made, or the Bank became otherwise indebted to them, but who are no longer stockholders thereof, and depriving the appellant stockholders of the right to contribution from former stockholders to which said rights and remedies they were entitled under said section 39 of Article 3 of the Constitution of Maryland and statutes passed pursuant thereto and in accordance therewith and under the long established and well-settled law of Maryland that stockholders were not discharged from liability by the mere transfer of their stock.

3. That the invalidity and unconstitutionality of said section 72 result, from the reasons aforesaid, only because [fol. 68] of the misconstruction placed upon the same by the Court of Appeals of Maryland in limiting the liability purporting to be imposed by said section 72 to stockholders of record only; whereas, the proper construction of said section (in accordance with the long established and well-settled law of Maryland under said section 39 of Article 3 of the Constitution of Maryland that stockholders of banks are contractually liable only for such debts of

the bank as were incurred while they were stockholders) will preserve the validity of said section and the constitutional rights of the appellants.

B. Portions of Record Necessary to Consideration of the Above Points of Law

The appellants designate as the portions of the record necessary for the consideration of the points relied upon by them, to be the entire transcript of the record transmitted to the Supreme Court of the United States by the Court of Appeals of Maryland, except, as follows:

The Clerk of the Supreme Court of the United States shall omit from the printed record (unless required by the rules of said Court to be included therein) the following portions of the transcript:

1. Petition for appeal from the Court of Appeals of Maryland to the Supreme Court of the United States and Order of Court thereon.

2. Citation to appellee and proof of service thereof.

3. Statement of appellants as to jurisdiction of Supreme Court of the United States.

4. Appellants' assignment of errors.

5. Statement served upon the attorneys for the appellee setting forth, and directing their attention to, the provi- [fol. 69] sions of paragraph 3 of rule 12 of the Revised Rules of the Supreme Court of the United States, and acknowledging service upon them of petition for and Order of Court allowing appeal, appellants' assignment of errors and appellants' statement as to jurisdiction.

6. Statement of appellee making against the jurisdiction of the Supreme Court of the United States and moving to dismiss or affirm.

7. Stipulation for transcript of record from Court of Appeals of Maryland to Supreme Court of the United States, except that there is to be included in the printed

record the portion of said stipulation entitled "Additional Stipulation" and being item No. 12 of said Stipulation.

Levin Stonebraker, C. Walter Baker, Daniel W. Doub, Martin V. B. Bostetter, Charles F. Wagaman, John Wagaman, Attorneys for Appellants.

Service acknowledged this 10th day of August, 1936.

Robt. H. McCauley, J. Lloyd Harshman, Attorneys for Appellee.

[fol. 70] [File endorsement omitted.]

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Endorsed on cover: File No. 40,839. Maryland Court of Appeals. Term No. 299. Stockholders of Hagerstown Bank and Trust Company, appellants, vs. Warren F. Sterling, Receiver for Hagerstown Bank and Trust Company, etc. Filed August 20, 1936. Term No. 299, O. T., 1936.

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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## No. 298

---

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,

*Appellants,*

*vs.*

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG.

---

## No. 299

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

*Appellants,*

*vs.*

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR THE HAGERSTOWN BANK AND TRUST COMPANY,

*Appellee.*

---

*To the Honorable the Judges of Said Court:*

This, the petition of the appellants in the above entitled causes, respectfully represents:

1. That heretofore, to wit, on the 13th day of July, A. D. 1936, your petitioners presented unto his Honor, Carroll

T. Bond, Chief Judge of the Court of Appeals of Maryland, petitions praying for the allowance of appeals to this Honorable Court in the above entitled causes and at the same time presented unto said Judge a Statement in each of said causes showing the jurisdiction of this Honorable Court.

2. That said Statements conformed with paragraph 1 of Rule 12 of this Honorable Court as the same was constituted prior to July 1, 1936, but did not conform with said Rule as amended because your petitioners were in ignorance of said amendments.

Wherefore your petitioners pray leave to file a consolidated amended Statement in conformity with paragraph 1 of Rule 12 as amended.

Respectfully submitted,

D. ANGLE WOLFINGER,
CHARLES F. WAGAMAN,
JOHN WAGAMAN,
*Attorneys for Appellants in No.* 298.

LEVIN STONEBRAKER,
MARTIN V. B. BOSTETTER.
C. WALTER BAKER.
CHARLES F. WAGAMAN,
DANIEL W. DOUB,
JOHN WAGAMAN,
*Attorneys for Appellants in No.* 299

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

---

## No. 298

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,

*Appellants,*

*vs.*

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG.

---

## No. 299

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

*Appellants,*

*vs.*

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR THE HAGERSTOWN BANK AND TRUST COMPANY,

*Appellee.*

**CONSOLIDATED AMENDED STATEMENT OF APPELLANTS, STOCKHOLDERS, AS TO JURISDICTION.**

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These are appeals by certain stockholders of the Peoples Banking Company of Smithsburg and of The Hagerstown

Bank and Trust Company, under Section 237 (a) of the Judicial Code (as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, the Act of January 31, 1928, c. 14, 45 Stat. 54, and the Act of April 26, 1928, c. 40, 45 Stat. 466), from final decrees of the Court of Appeals of Maryland, being decisions in favor of the validity of a certain statute of said state in suits in which the validity of said statute had been drawn in question on the ground of its being repugnant to the Constitution of the United States.

**Peoples Banking Company of Smithsburg, Maryland.**

The Peoples Banking Company of Smithsburg was incorporated under the general corporation law of Maryland on January 24, 1910, and operated as a going banking business from shortly after said date until June 29, 1931, when it closed its doors and ceased active operation of its business. At least three hundred forty-five shares of the capital stock of said bank were acquired by some of the appellants herein prior to June 1, 1910, the effective date of Section 72 of Article 11 of the Code of Maryland hereinafter referred to, which said shares have ever since been held and owned by said appellants (R. 17). The charter of said bank (R. 21) authorized it to conduct a general banking business but did not authorize it to, and it never did, act as fiduciary or exercise any trust powers. On May 5, 1933, in proceedings instituted by the State of Maryland against the said Peoples Banking Company of Smithsburg on the equity side of the Circuit Court for Washington County, Maryland, in proceedings designated on the docket of said Court as No. 12,277 Equity John J. Ghingher, Bank Commissioner, was duly appointed receiver for said bank (R. 3). On June 19, 1933, the said receiver filed a petition in said proceedings asking that the court pass and the court thereon passed, an order assessing the stockholders of record of said bank, under the purported authority of

the provisions of Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland, 1924 Edition, Vol. 1, page 346 (R. 3-7), 100 per cent of the par value of the shares of stock of said bank held by them respectively.

For some years prior to the closing of said Bank its capital was represented by 4000 shares of stock of the par value of ten ($10.00) dollars each. The stockholders who intervened in the original proceeding in the Circuit Court for Washington County, Maryland, and who are prosecuting this appeal number approximately 130 and own more than one half of the capital stock of said Bank. This appeal, therefore, involves the question of the nature and extent of the liability of the appellants on their respective shares of bank stock.

On February 15, 1935, the appellants herein filed petitions in the Circuit Court for Washington County, Maryland, praying that said order of June 19, 1933, might be rescinded and revoked (R. 7-11). Said petitions assigned as reasons therefor that said Section 72 was unconstitutional and invalid as being contrary to the provisions of the Constitution of the United States, in impairing the obligation of their contracts and depriving them of property without due process of law and that the order of court assessing stockholders imposed upon them a liability different from that contractual liability which they had assumed upon the acquisition of their stock (R. 7-13). And in said petitions said appellants claimed and asserted that they were liable, if liable at all, only for the debts of said bank that were incurred while they were stockholders, and that no stockholder could be rendered liable by reason of his holding stock for debts of the bank created prior to his acquisition of stock (R. 9, 11). Upon a hearing the Circuit Court for Washington County, Maryland, rescinded and revoked its said order of June 19, 1933, saying in part: "The allegations of this petition and the answer of the

Bank Commissioner thereto, raise the question of the constitutionality of Sec. 72 of Article 11 of the Annotated Code, and if it be held constitutional, its proper construction and effect", and by its opinion held that Section 72 was constitutional, but that its proper construction placed upon stockholders liability only for debts of the bank that were incurred while individual stockholders held their stock (R. 27-39).

The receiver appealed said ruling to the Court of Appeals of Maryland and on February 20, 1936, the said Court of Appeals filed its decree in said cause reversing the decree of the Circuit Court for Washington County, Maryland, and by said decree, held that stockholders of record upon the appointment of a receiver were liable for all the debts of said bank and rejected the contention of the appellants that by a proper construction of said Section 72 stockholders were liable only for the debts that were incurred while they were such and said opinion and decree held said act to be valid and constitutional.

**The Hagerstown Bank and Trust Company.**

The Hagerstown Bank and Trust Company was incorporated by special Act of the Legislature of Maryland in 1902 and began business in June, 1908 (R. 4). It closed its doors and ceased active operation of its business on the 25th day of February, 1933. On December 3, 1934, in proceedings instituted by the State of Maryland against the said Hagerstown Bank and Trust Company on the Equity side of the Circuit Court for Washington County, Maryland, in proceedings designated on the docket of said Court as No. 12777 Equity, a Receiver was appointed by the said Court for the said Hagerstown Bank and Trust Company (R. 1). On the 16th day of January, 1935, the said Receiver filed a petition in said proceedings asking that the Court pass an order assessing the stockholders of said bank under the

purported authority of the provisions of Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland, 1924 Edition, Volume 1, page 346 (R. 4). On said petition said Court passed an order assessing stockholders of said bank 100% of the par value of their stock provided no good cause to the contrary was shown on or before a day named therein (R. 7). On or before the day named in said order or duly authorized extensions thereof a number of the stockholders of the Hagerstown Bank and Trust Company filed answers showing cause against said order of assessment being made final and in said answers said stockholders assigned as their reasons therefor that said Section 72 was unconstitutional and invalid as being contrary to the provisions of the Constitution of the United States in impairing the obligation of their contracts and depriving them of property without due process of law and also assigned as reasons therefor that the order of Court assessing stockholders imposed upon them a liability different from the contractual liability which they had agreed to upon the acquisition of their stock (R. 8-15). And in said answers said stockholders claimed and asserted that the stockholders of said bank were liable only for the debts of said bank that had been incurred while said stockholders were such and that no stockholder could be rendered liable by reason of his holding stock for debts of the bank created prior to his acquisition of stock (R. 8-15). Upon a hearing, the Circuit Court for Washington County held the cause shown as aforesaid to be good and revoked and rescinded its said order and dismissed the petition filed as aforesaid on the 16th day of January, 1935 (R. 45), and by its opinion adopted the opinion filed in the *Peoples Banking Company* case and held that Section 72 was constitutional, but that its proper construction placed upon stockholders only liability for debts of the bank that were incurred (R. 33-45) while individual stockholders held their stock.

The Receiver appealed said ruling to the Court of Appeals of Maryland and on the 20th day of February, 1936, the said Court of Appeals filed its decree in said cause reversing the decree of the Circuit Court for Washington County, Maryland, and by said decree, held that stockholders of record upon the appointment of a Receiver were liable for all the debts of said bank and rejected the contention of the stockholders that by a proper construction of said Section 72 stockholders were only liable for the debts that were created while they were such and said opinion and decree held said act to be valid and constitutional.

For some years prior to the closing of said Bank its capital was represented by 55,000 shares of stock of the par value of $10.00 each. The appellants herein are the owners of more than 3,500 shares of said stock. This appeal therefore, involves the question of the nature and extent of their liability upon said shares.

The opinions of the Circuit Court for Washington County, Maryland, and of the Court of Appeals of Maryland, hereto appended, show that the proceedings in said respective courts raise the questions of the constitutionality and construction of Section 72 of Article 11 of the Annotated Code of Maryland, hereinafter set forth, and likewise, show that said Court of Appeals held said Section 72 to be constitutional.

**Law.**

Section 1 of Rule 43 of the Court of Appeals of the State of Maryland provides:

> "SEC. 1. No motion for reargument will be entertained unless a petition, distinctly stating the grounds for the same, be filed within thirty days after the opinion of the Court has been delivered; and no reargument will then be allowed unless a majority of the

Judges who concurred in the opinion consent to it. An opportunity will be given the opposite party to file a reply to such motion, if any member of the Court who concurred in the opinion requests it before the motion is acted on."

Within 30 days from said February 20, 1936, a motion for reargument was filed in said causes, which motions were overruled on the 15th day of April, 1936, and this appeal was applied for and allowed on the 13th day of July, 1936.

The Supreme Court of the United States in the cases of *Morse* v. *United States,* 270 U. S. 151, and *Texas & Pacific Railway* v. *Murphy,* 111 U. S. 488, decided that the three months period in which an appeal to that Court must be taken from the highest court in the State begins to run only after a motion for reargument seasonably filed in the highest court in the State has been denied.

The statute, the validity and construction of which is involved in this appeal is Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland, 1924 Edition, Vol. 1, page 346 and provides as follows:

"SEC. 72. Stockholders of every bank and trust Company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee, shall not be personally subject to any liability on such stock, but the one pledging stock, and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares; and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors

and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction. Nothing in this section or article shall be construed to repeal or affect the existing rights of creditors or liabilities of stockholders of any trust company under the existing law at the time of the passage or taking effect of this article."

The Constitution of Maryland in force since September 18, 1867, by Section 39 of Article 3 provides:

"SEC. 39. The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by Law."

Section 11 of Chapter 206 of the Acts of 1870 of the General Assembly of Maryland (Annotated Code of Maryland of 1888, Sec. 27, Art. 11) provides as follows:

"The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition that this Act and every part of it may be altered from time to time or repealed, by the Legislature."

This Act is the general liability act in force, as originally enacted and through successive legislative renewals thereof, from June 1, 1870, until June 1 ,1910, and is the

Act determining the liability of such of the appellants as acquired their stock before June 1, 1910, when this section was repealed and replaced by Section 72 of Article 11 aforesaid. Under said Act of 1870 and the Constitution aforesaid and under many provisions in individual charters of banks substantially identical in language with the aforesaid provision of the Constitution of Maryland and with the provisions of the aforesaid Act of 1870, the Court of Appeals of Maryland in the cases listed below determined the nature of the liability of stockholders of banks to be as follows:

1. The liability of stockholders of banks for the debts thereof is contractual and not penal in its nature.

*Norris* v. *Wrenschall,* 34 Md. 499;
*Coulbourn* v. *Boulton,* 100 Md. 350;
*Republic Iron and Steel Co.* v. *Carlton,* 189 Fed. 130;
*Brant* v. *Echlen,* 59 Md. 351;
*Steel Co.* v. *Equitable Society,* 113 Md. 80;
*Colton* v. *Mayer,* 90 Md. 711;
*Hager* v. *Cleveland,* 36 Md. 476;
*Murphy* v. *Wheatley,* 102 Md. 501;
*Miners Bank* v. *Snyder,* 100 Md. 57;
*Basshor* v. *Forbes,* 36 Md. 154.

2. The liability of stockholders of banks is a direct liability to creditors and not to the receiver.

*Colton* v. *Mayer,* 90 Md. 711;
*Miners Bank* v. *Snyder,* 100 Md. 57;
*Murphy* v. *Wheatley,* 102 Md. 501;
*Hammond* v. *Straus,* 53 Md. 1.

3. Creditors could therefore waive said liability by agreement.

*Basshor* v. *Forbes,* 36 Md. 154;
*Murphy* v. *Wheatley,* 102 Md. 501.

4. The stockholders liability for the debts of the bank was for such debts and liabilities only as were incurred or contracted by the bank during the particular period each stockholder was such.

*Hammond* v. *Straus,* 53 Md. 1;
*Matthews* v. *Albert,* 24 Md. 527;
*Norris* v. *Wrenschall,* 34 Md. 492;
*Hager* v. *Cleveland,* 36 Md. 476;
*Weber* v. *Fickey,* 47 Md. 196;
*Miners Bank* v. *Snyder,* 100 Md. 57;
*Murphy* v. *Wheatley,* 102 Md. 501.

5. The stockholders were not liable for debts of the bank incurred prior to their respective acquisition of stock.

*Murphy* v. *Wheatley,* 102 Md. 501.

6. The stockholder was not liable for debts and liabilities of the bank incurred after he transferred his stock.

*Matthews* v. *Albert,* 24 Md. 527;
*Hager* v. *Cleveland,* 36 Md. 476;
*Emmert* v. *Smith,* 40 Md. 123.

7. But the stockholder, although he transferred his stock, remained liable for the debts of the bank incurred while he was such.

*Hager* v. *Cleveland,* 36 Md. 476;
*Matthews* v. *Albert,* 24 Md. 527;
*Emmert* v. *Smith,* 40 Md. 123.

8. The stockholder had the right to set off against the liability upon his stock what, if any, debts were due him from the bank.

*Cahill* v. *Original Big Gun Association,* 94 Md. 353;
*Strauss* v. *Denny,* 95 Md. 690.

The aforegoing Maryland cases established the nature and incidents of the liability of bank stockholders in Mary-

land at least from and after the decision of *Hammond* v. *Straus*, 53 Md. 1, in 1880, until the decision of the Court of Appeals of Maryland in this cause.

The present statutory provision of the law of Maryland imposing liability upon the holders of bank stock is Section 72 of Article 11 aforesaid, which has been in force continuously from June 1, 1910.

The language used to name the stockholders liable and the language used to designate the measure and extent of their liability is substantially identical with the language used in the Constitution and the statutes construed in the Maryland cases set forth above.

Although it is not within the power of the legislature to exempt stockholders of banks from the liability imposed by the provision of the Constitution of Maryland aforesaid (*Mister* v. *Thomas*, 122 Md. 445), the Court of Appeals of Maryland in the instant case has determined:

1. That under said Section 72 there is no contractual liability to creditors, but that the liability of stockholders is an asset of the banking corporation.

2. That stockholders of record at the time of the appointment of a receiver are liable for all of the debts of the bank irrespective of the times said debts were incurred.

3. That stockholders of banks are liable for the debts thereof incurred prior to their acquisition of stock.

4. That the liability of a former stockholder for the debts of the bank is discharged by his transfer of stock.

5. That the stockholder has no right to set off against his liability what, if any, debt is due him from the bank.

Therefore, until the decision of the instant case the nature and incidents of the contractual liability of the appellants were fixed under the Maryland constitutional provision aforesaid to be for different amounts and to different

persons and with various other different incidents than the liability determined in this case to be that of bank stockholders under the present statute.

The decision of the Supreme Court of a State construing and applying its own Constitution and laws generally is binding upon the Supreme Court of the United States; but that is not so where the contract clause of the Federal Constitution is involved. In that case the Supreme Court of the United States will give careful and respectful consideration and all due weight to the adjudication of the State court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected.

*Coombes* v. *Getz*, 285 U. S. 434;
*Jefferson Branch Bank* v. *Skelley*, 1 Black. 436;
*Northern Pacific Railway Co.* v. *Duluth*, 208 U. S. 583;
*King* v. *Augusta*, 277 U. S. 100;
*Bacon* v. *Texas*, 163 U. S. 207;
*Louisville Gas Co.* v. *Citizens Gas-Light Co.*, 115 U. S. 683;
*Wright* v. *Nagel*, 101 U. S. 791;
*Louisville and Nashville Railroad Co.* v. *Palmes*, 109 U. S. 244;
*Scott* v. *McNeal*, 154 U. S. 34;
*Sterns* v. *Minnesota*, 179 U. S. 223;
*Louisiana Railway and Navigation Co.* v. *New Orleans*, 235 U. S. 164;
*Huntingdon* v. *Attrill*, 146 U. S. 657;
*N. O. Water Works* v. *La. Sugar Co.*, 125 U. S. 18;
*Bridge Proprietors* v. *Hoboken Co.*, 1 Wallace 116.

That the liability of the appellants under Section 39 of Article 3 of the Constitution of Maryland is contractual and that this contract is within the protection of the contract clause of the Federal Constitution is established by decisions of the Supreme Court of the United States.

*Bernheimer* v. *Converse*, 206 U. S. 516;
*Hawthorne* v. *Calef*, 69 U. S. 10;
*Coombes* v. *Getz*, 285 U. S. 434.

Under the decisions of the Supreme Court of the United States the obligations of a contract as defined by the "settled law" at the time the contract was entered into (to wit, at the time the stockholder acquired his stock and entered into the relationship with the bank and its creditors) continue to be a part of the contract and the obligation thereof cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law.

*Ohio Life Insurance Co.* v. *Debolt*, 16 Howard 416;
*Piqua State Bank* v. *Knoop*, 16 Howard 369;
*Louisiana and Nashville Railway Co.* v. *Palmes*, 109 U. S. 244;
*Louisiana* v. *Pilsbury*, 105 U. S. 78;
*Coombes* v. *Getz*, 285 U. S. 434.

Those stockholders of the Peoples Banking Company of Smithsburg, Maryland, who acquired their stock prior to June 1, 1910 when said Act of 1870 was in effect can be held liable only on the basis of the contract under the law then in force, and it would seem clear that said Section 72 as construed in this cause by the Court of Appeals of Maryland, retrospectively affects said contracts and is unconstitutional as impairing the obligations thereof and as depriving said stockholders of property without due process of law.

Although there is no provision in the Constitution of Maryland concerning the liability of stockholders of trust companies The Hagerstown Bank and Trust Company likewise had banking powers and the liability of its stockholders is therefore equally affected by the Maryland Constitution and statutes set forth above.

It is therefore respectfully submitted that this Honorable Court has jurisdiction of the matters in controversy in these causes.

Respectfully submitted,

D. Angle Wolfinger,
Charles F. Wagaman,
John Wagaman,
*Attorneys for Appellants in No. 298.*

Levin Stonebraker,
Martin V. B. Bostetter,
C. Walter Baker,
Charles F. Wagaman,
Daniel W. Doub,
John Wagaman,
*Attorneys for Appellants in No. 299.*

Service acknowledged this 24th day of August, 1936.

Elias B. Hartle,
William H. Bovey,
*Attorneys for Appellee in No. 298.*

Service acknowledged this 24th day of August, 1936.

Robt. H. McCauley,
J. Lloyd Harshman,
*Attorneys for Appellee in No. 299.*

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY

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**Equity.**

# No. 12277

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STATE OF MARYLAND

*vs.*

THE PEOPLES BANKING COMPANY.

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## OPINION OF THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND.

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SLOAN, *C. J.*, and WAGAMAN, *A. J.*:

On the 5th day of April, 1933, the Bank Commissioner was appointed receiver of the Peoples Banking Company of Smithsburg, hereinafter called Bank, and its affairs are now in the hands of the said Commissioner for the purpose of liquidation.

On June 19, 1933, this Court passed an order and decree requiring "each stockholder of the Peoples Banking Company of Smithsburg, Maryland, to pay to John J. Ghingher, Bank Commissioner, receiver for the said" Bank "an amount of money equal to the par value of the share or shares of the capital stock of the said" Bank held by him and further ordering and authorizing the Bank Commissioner to proceed by law with the collection of the assessment so made.

On February 15, 1935, a large number of persons who were stockholders of the Bank at the time of the appointment of a receiver filed their petition praying that they be

made parties defendant in the said proceedings. The prayer of this petition was granted. On the same day these new parties defendant filed their petition praying that the said order of June 19, 1933, be rescinded and revoked. The allegations of this petition and the answer of the Bank Commissioner thereto, raises the question of the constitutionality of Sec. 72 of Art. 11 of the Annotated Code, and if it be held constitutional, its proper construction and effect.

The more material facts appearing from the testimony and stipulation filed in the case are as follows:

The Bank was incorporated under the general provisions of the law on the 24th day of February, 1910. Many of the petitioners were creditors of the Bank at the time of the appointment of the receiver, as well as stockholders. Thirteen of these stockholders were such prior to June 1, 1910, the effective date of the Act of Assembly now appearing in the Code as above stated.

The liability of a stockholder of a corporation to be called upon to pay the debts of the corporation is a liability founded upon contract. *Norris* v. *Wrenschall*, 34 Md. 499; *Brant* v. *Echlen*, 59 Md. 351; *Coulbourn* v. *Boulton*, 100 Md. 351; *Steel Co.* v. *Equitable Soc.*, 113 Md. 80; *Colton* v. *Mayer*, 90 Md. 711; *Republic Iron & Steel Co.* v. *Carlton*, 189 Fed. 130.

In *Norris* v. *Wrenschall, supra*, page 500, it is said in an opinion by Judge Miller, that the stockholder's liability "is not in the nature of a penalty, like that in other sections, imposed upon the trustees, managers, directors or other officers of the corporation, for doing that which the statute expressly or by implication forbids, or omission to do something which the law directs to be done * * * it is * * * virtually and in effect a liability upon a contract and the mutual agreement of the parties, not indeed in form an expressed personal contract, but an agreement of equally binding obligation consequent upon, and resulting from, the acts and admissions or implied assent of the parties." Or, as said by Judge Rose in *Republic Iron & Steel Co.* v. *Carlton, supra*, "In Maryland the liability of a stockholder to a creditor of a corporation is one founded on contract * * * it follows that the plaintiff has a right to insist that the obligation of that contract shall not be impaired by subse-

quent legislation, nor may the State so change the remedy as substantially to impair or lessen the value of the contract."

Since the right of a creditor and the liability of a stockholder is founded on contract, and the contract is a creature either of the Constitution of the State or of valid statutes passed by the Legislature in pursuance of and in accordance with the Legislature's constitutional powers, it is necessary to examine first the constitutional provisions.

Sec. 39 of Art. 3 of the Constitution is as follows:

"The General Assembly shall grant no charter for banking purposes, nor renew any banking corporation now in existence, except upon the condition that the stockholders shall be liable to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all banks shall be open to inspection under such regulations as may be prescribed by law."

Since the adoption of the Constitution of 1867, there have been but two general statutes dealing with the subject matter of Art. 3, Sec. 39. The first was Sec. 11 of Chap. 206 of the Acts of 1870, appearing in the Code of 1888 as Sec. 27 of Art. 11. The second was Sec. 68 of Chap. 219 of the Acts of 1910, appearing in the present Code as Sec. 72 of Art. 11.

The Act of 1870, Chap. 206, Sec. 11, is as follows:

"The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise, and upon this further condition, that this article and every part of it may be altered from time to time, or repealed, by the Legislature."

This Act is in the identical language of Sec. 39 of Art. 3 of the Constitution, except that it includes the directors as well as the stockholders.

Chapter 338 of the Acts of 1852 authorized the formation of corporations for manufacturing purposes. Sec. 9 of that Act provided, "That all stockholders of every company incorporated under this Act shall be severally and individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company," until the whole amount of capital stock is paid in. In Matthews vs. Albert, 24 Md. 527, the creditor of a manufacturing company sought to recover from a stockholder the double liability under the section quoted. It was held that the stockholder was liable for the debt of the corporation while he was a stockholder, but was not liable to a creditor who became such after his stock had been transferred. This case was decided in 1866.

In *Norris* v. *Wrenschall,* 34 Md. 492, a creditor of a manufacturing corporation sought to recover against a stockholder the double liability under Sec. 52 of Art. 26 of the Code of 1860, being the same statutory provision under consideration in the last mentioned case. The Court said: "We have also there (Norris *v.* Johnson, ante, page 485) determined that the extent of the liability of each stockholder is measured by the amount of stock held by him at the time the debt was contracted, and continues at least until all the capital stock is paid in, and is in no wise affected by the amount thereof that may at any time remain unpaid. There is no provision in the Code by which this liability is made dependent upon any other contingency than the contracting of the debts by the corporation, whilst the defendant was a stockholder, and before the capital stock is fully paid up. These two conditions make the liability determinate and irrevocable."

*Hager* v. *Cleveland,* 36 Md. 476, was the same character of case as the one last mentioned. The Court says: "This brings us to the second ground of defense; whether the transfer of stock by the appellant, exonerates him from personal liability for a debt contracted when he was a stockholder and before the whole capital stock was paid in."

"The language of Sec. 52, it must be admitted is general in its terms, and does not in words declare whether the in-

dividual liability shall attach to such as are stockholders at the time the debt is contracted, or to those holding stock at the time the suit was brought. It is obvious, however, that the protection of the creditor was the paramount object the Legislature had in view and the section in question, ought to receive such a construction as will best accomplish this object." The Court later quoting from *Norris* v. *Wrenschall, supra,* says: "It is a debt under the statute due from the stockholder to the creditor, springing out of and coexistent with the contract between the corporation and the creditor," (*Colton* v. *Mayer,* 90 Md. 717), and then says: "If so, if it be a debt due from the stockholder to the creditor co-existent with the contract by the company, it is clear that no act by the stockholder without the consent of the creditor can exonerate him from the liability thus incurred. The relation of stockholder creates a perfect legal obligation to pay the debts contracted by the company, and it is upon the faith of this perfect legal obligation that parties deal with the company. The liability of the stockholder, being therefore, in the nature of a contract made between the company, the creditor and himself, we are of opinion that it continues and *is in no manner affected by the mere transfer of his stock.* (Italics ours.) (Court's.) This construction is fully warranted by the language of the statute and best accomplishes the purpose of the Legislature, namely, the protection and security of creditors."

In *Weber* v. *Fickey,* 47 Md. 196, the Court was construing the liability of a stockholder under Sec. 59 of Chap. 325 of the Acts of 1872, the statute being similar to the one in the aforegoing cases. In passing upon a demurrer to the declaration in a suit at law the Court says: "Another defect in the declaration is the omission to allege that the defendant was a stockholder at the time the debt sued for was contracted. It is not sufficient that he should have become one afterwards or was so at some time prior to the date of the credit given, he must have been a stockholder at the time. *Hager* v. *Cleveland,* 36 Md. 476, and this is as essential to the right of recovery against him as the fact that there is an amount of his subscription still unpaid. It is as

necessary to aver the one as the other, and the omission of either averment from the declaration is a fatal defect."

In *Hammond* v. *Straus,* 53 Md., the Court had under consideration the liability of a stockholder of a banking corporation to a creditor of the bank. The provisions of the charter of the bank with respect to this liability are contained in Sec. 14 of Chap. 118 of the Acts of 1874, and are identical in language with the constitutional provisions heretofore referred to, with the addition of "directors" to "stockholders," and with the Act of 1870, Chap. 206, Sec. 11, heretofore referred to. The Court announced, "To entitle the plaintiff (creditor) to recover in this action it was essential that three things should be made to appear: 1. That a corporation, such as that alleged should have been created. 2. That the defendant was a stockholder therein, and 3. That the plaintiff was a creditor of the corporation and that he became such while the defendant was a stockholder," and Judge Boyd said in *Murphy* v. *Wheatley,* 102 Md. 501, 517:

"If depositors and other creditors become such before stockholders occupying that relation to the company they cannot say that they relied on those persons for additional security, or had any right to look to them, for they were not then, and might never become stockholders. But under the rule adopted by this Court, they can if they choose ascertain who the stockholders are when the debts are contracted."

In *Colton* v. *Mayer,* 90 Md. 711, the Court considered the rights of creditors and the liabilities of stockholders under the provisions contained in the Charter of the South Baltimore Bank. The suit was by receivers against a stockholder. The charter fixed the rights of the creditor and the obligations of the stockholder in the identical language of the Constitution, except that it added "directors," to the stockholders. The Court reaffirmed *Hammond* v. *Straus, supra,* and went on to say: "In as much as this charter does not authorize the receivers to sue, the test of their right to do so is to ascertain whether it gave the corporation any property or estate in this liability of the stockholders, or

in any manner made it an asset of the bank, for, unless it did, it is clear that they cannot maintain this suit against the defendant on the mere ground that he was a stockholder. When the charter says, that the stockholders and directors of this corporation shall be liable to the amount of their respective shares of stock 'for all of its debts and liabilities' to whom were they to be so liable? Clearly not to the corporation for its own debts and liabilities, but manifestly they were to be liable to the creditors." And the Court further says: "There was no liability of any kind to the corporation, by reason of this provision in the charter, and at no time from its organization to its dissolution could it have demanded one penny from the appellee on account of it."

*Murphy* v. *Wheatley,* 102 Md. 501, was a suit to enforce the triple liability of stockholders in a trust company under Section 85L of Article 23 of the Code, Act of 1892, Chapter 109, and it was there held that a stockholder was not liable to a creditor who became such before the ownership of the stock, a liability denied by the Circuit Court. In that case the opinion by Judge Boyd says: "We are aware that many courts—perhaps a majority of those in this Country—have held to the contrary, but the decisions of this Court unquestionably sustain that answer of the lower Court. It is to be regretted if this construction of the statute will cause such difficulties as are suggested by the appellants (of accounting, collection and apportionment), but even such results would be preferable to the risk of doing manifest injustice to those who become stockholders during the closing days of this company. And on page 518, it is said, "The liability, in this respect, is well settled in the State in the earlier cases. They held that the extent of the liability was measured by the amount of stock held by the stockholders *at the times the debts were contracted,* and stockholders were not liable for debts contracted *before* they became such." If this is not the law now, then the stockholders' liability is a penalty and is not contractual. To hold that this liability is a penalty for owning stock the day a bank closes would be not only to overrule the decisions, but to repudiate the interpretation given the consti-

tutional provision (Art. 3, Sec. 39) by Judge Alvey in *Hammond* v. *Straus,* 53 Md. 1, and by Judge Boyd in *Colton* v. *Mayer,* 90 Md. 711.

The cases from which we have quoted, and to which we have referred, firmly establish the principle upon which stockholders are held liable to creditors in Maryland. Some of these cases have considered statutes wherein the language was similar to the language of the Constitution. Others have considered language identical with the language of the Constitution. One of them was decided before the adoption of the Constitution. None of these cases has ever been overruled, nor its authority questioned. From them we think it clearly decided that Sec. 39 of Art. 3 of the Constitution requires the Legislature to give to creditors of banks, and to impose upon stockholders of banks, the following rights and obligations respectively. First. To give to creditors and impose upon stockholders direct and immediate responsibility to be enforced between themselves. Second. To give the creditor the right to pursue a stockholder, and to place upon the stockholder a liability, for the debts of the bank incurred while the stockholder was such. Third. The right of the creditor and the responsibility of the stockholder to continue, notwithstanding the stockholder transfers his stock. And fourth. The liability of the stockholder to be an asset of the creditor and not an asset of the corporation. It does not require the Legislature to impose liability on a stockholder for any debts except those attaching while the stockholder is such.

These rights of creditors against stockholders, which the Constitution requires the Legislature to give them, are property. If these rights are property it is not within the power of the Legislature to take them away. As stated in *Mister* v. *Thomas,* 122 Md. 445-457, "It is not, therefore within the power of the Legislature to have exempted the stockholders of such a corporation from the obligations imposed by Section 39 of Art. 3 of the Constitution." This liability, in order to be unassailable, must be a property right, and if so available to creditors against stockholders who were such when the debt was created. If this is not true then the only alternative is to declare it to be a pen

alty. If a penalty the stockholder, if he sees a bank's failure ahead may rid himself of stock in any way he chooses, no matter what his motive may be, and he can thus free himself of liability. If the transfer be in fraud of any one's right, it must be a property right. There can be no fraud in ridding onesself of a penalty.

It is in the light of these principles, and in that light alone, that we are bound to approach the consideration of Section 72 of Article 11 of the Code.

There is no prohibition in the Constitution against giving creditors of banks rights or imposing upon stockholders obligations greater than required by the Constitution. *Murphy* v. *Wheatley, supra.* But, when we come to consider the only other Act relating to the rights of creditors against stockholders of banks, to wit, Section 72 of Article 11 of the Code, we are bound to assume the Legislature intended to obey the Constitutional Mandate to it; for it would ill become the Court to charge a coordinate branch of the State Government with a wilful disobedience of the will of the people as expressed in the fundamental law. If, therefore, Section 72 of Article 11 of the Code is found to give to creditors the rights, and to impose upon stockholders the liabilities required by the Constitution, it will be no objection to find that it gives greater rights to creditors and imposes greater liabilities upon stockholders. However, if the Section of the Code under consideration is found to give only one right to creditors and impose one liability upon stockholders, then, if by any reasonably possible construction the Act can be held to comply with the Constitutional Mandate, it must be so held. And if the section in question is found to undertake to deny creditors the rights guaranteed to them by the Constitution, it must be held to contravene Section 10 of Article 1 of the Federal Constitution, as well as the Fourteenth Amendment thereto, and in addition thereto the 23rd Article of our own Bill of Rights. *Md. Jockey Club* v. *State*, 106 Md. 413; *Hawthorne* v. *Calf*, 2 Wall. 10-21.

Section 72 of Article 11 of the Code purports to provide but one fund for the benefit of creditors of banks. It purports to impose but one obligation upon stockholders. We

think its provisions can reasonably be construed as complying with the provisions of the Constitution. Any other construction would mean that every State bank organized under the general law would be unlawfully operating because of the absence of the requirement of Article 3, Section 39 of the Constitution. That provision must be fastened on every bank chartered by this State.

The Constitution provides that stockholders shall be liable for "all debts, etc." The Act of 1870 used the same language. The charter in *Hammond* v. *Straus, supra,* repeated it. The statute in *Murphy* v. *Wheatley, supra,* also repeated it. The Charter in *Colton* v. *Mayer, supra,* did likewise. These cases determined that the liability for "all debts, etc." meant debts attaching at the time the stockholders were such irrespective of any subsequent transfer of the stock. When, therefore, the Legislature in 1910 in the section under consideration again repeated the identical language "all debts, etc." which had been given a very definite meaning by the cases referred to, it must be held to have intended the meaning already given it, unless a different meaning is forced by a different context. There is nothing in the Section of the Code under consideration that compels a different interpretation of the language. The "debts" to be benefited by the liability imposed under all the cases were not the debts which might be owing upon the insolvency of the bank. As to each stockholder they were the "debts" attaching during the time he was such.

The "stockholders" to be liable were designated in the charters in the cases cited, as well as in the constitutional provision, by the same language as they are designated in Section 72 of Article 11. The Legislature therefore must have meant the same class of individuals as was determined to be included within that description in the language used in the cases. And "stockholders" as defined in the section must therefore be held to be the stockholders at the time of the creation of the debt for which the liability is sought to be enforced, irrespective of the transfer of their stock.

Not only is there no indication in this section that it was intended to make liable only stockholders of record at the

time of the insolvency of the bank, but it affirmatively appears by the repetition of the language already interpreted as intended not to do so.

Beginning with the Act of 1892, Chapter 109, there are many statutes fixing the liabilities of stockholders of trust, guaranty and other corporations, as to which the Constitution contains no provision. In every one of those Acts the rights of preexisting creditors are reserved. Likewise in Section 72 of Article 11, the preexisting rights of creditors of trust companies are reserved. As to creditors of banks there is no such reservation. As to banks the only previous statute was the Act of 1870, which, as has been said, was in the language of the Constitution. From this failure in the Act of 1910 to reserve the preexisting rights of creditors of banks, the only logical conclusion is that the Legislature did not, by that statute, intend to make any change in those rights; but intended only to provide a different procedure for their enforcement. This view further confirms us in our conclusion that the rights of creditors of banks under the Act of 1910 are identical with those rights under the Act of 1870, and that the Act of 1910 was intended by the Legislature to be construed exactly as was the Act of 1870, except so far as the Act of 1910 provides a different method of procedure.

Section 72 of Article 11 of the Code provides that the liability of stockholders shall be an "asset of the corporation". If by that language it is meant that this liability is for the benefit of all the creditors of the corporation, irrespective of the views we have heretofore expressed, then, in our view, it would be in violation of the Constitutional rights of creditors of the bank. If, on the other hand, it is held to mean that the liability of the stockholder is an asset of the corporation to be distributed by it or its receiver to the creditors according to their rights as heretofore defined, and we so construe it, then it merely provides for a more equitable distribution of the liability imposed for the benefit of creditors, and prevents multiplicity of suits among stockholders for contribution. This construction does no violence to the rights of creditors and the

statute thus construed is not rendered inconsistent with our State or Federal Constitutions.

*Miners & Merchants Bank* v. *Snyder,* 100 Md. 57.

*Mister* v. *Thomas,* 122 Md. was decided after the Act of 1910, but the receivers who brought the suit were appointed in 1907. The Farmers Trust, Banking and Deposit Co. for whom the receivers were appointed, were subject to the provisions of the Act of 1904, which was an amendment to Chapters 192 and 279 of Act of 1892, by which the stockholders were bound by Section 11 of the Charter. The order of the lower court directed the receivers to bring suit against stockholders "who would in any way be liable for the debt of the said company". There was nothing in this order limiting the liability to stockholders of record of the day of the receivership, from which it might be inferred that the Chancellor contemplated the possible liability of former stockholders. Nor did the Court of Appeals in the opinion by Judge Burke in terms say it was an asset of the corporation. What he did say (P. 458) was, that it was "to be treated as an asset of the corporation and enforced by the receivers under the order of that Court". The views we have herein before stated are therefore in no way inconsistent with this case.

We have hereinbefore stated that the liability of a stockholder of a bank is an "asset of the corporation" only in the sense that it may be collected by the receiver for the benefit of those creditors who became such while the stockholders against whom the liability is enforced, were such. In so determining we found that Section 72 of Article 11 of the Code, was intended to be a performance by the Legislature of the Constitutional Mandate and no more. It follows as a necessary result that stockholders who are also creditors are equitably entitled to set-off the debt of the bank to them against the stockholders' liability. Such a ruling is necessary to sustain the constitutionality of the statute, and is a reasonable construction of it.

In *Cahill* v. *Original Big Gun Asso.,* 94 Md. 353, the Court allowed the set-off because the charter considered in that case required it. The pertinent provisions of the char-

ter are in the identical language of the Constitution except that "directors" is added to stockholders against which liability is imposed. The Charter considered is the one, the effect of which was construed in *Colton* v. *Mayer, supra. Strauss* v. *Denny,* 95 Md. 690, reaffirmed this decision.

In the discussion of this case we are not unmindful of two recent cases in the Court of Appeals holding stockholders liable to assessment, but neither of them says what stockholders are liable nor for the benefit of what creditors was there such liability. Those cases were heard and decided on the theory of liability, and the constitutional provision was not under attack.

In the case of *Lange* v. *Ghingher,* 168 Md. —, 178A, 116, the question presented and decided was whether the stockholders of the American Trust Company were relieved of their statutory liability because of an agreement whereby management of the bank had been taken over by another bank, with other banks agreeing to share in any shortage in the liquidation of the insolvent bank.

In the case of *Robinson* v. *Hospelhorn,* 168 Md. —, Daily Record June 27, 1935, the decision was that the stockholders' liability was primary, and that the assessment of the stockholders' liability did not need to await the liquidation of the bank's assets and that the assessment was not required to be delayed until the liquidation of the bank's assets by a liquidating corporation to which the assets of the bank had been transferred under an assignment by which it had until July 1, 1938 to convert such assets.

These were the only questions submitted, argued and decided in that case. The questions submitted were so limited by the following stipulation in the record of that case:

"It is intended that all other questions, including the questions of insolvency, *vel non,* and the extent thereof, the status of subscribers to the guaranty fund, and the question as to the liability of particular stockholders for debts created before they became such, or after the bank passed into the control of the Bank Commissioner, and all other relevant questions are reserved for the future determination of the Court, as being unnecessary for present decision".

The fact that it has been the practice under the National Banking Act (U. S. Rev. St. Sec. 5151) to impose this liability upon all stockholders of record of the date of the receivership is neither precedent nor authority in this State. The Constitution of the United States is silent on the subject, and the statute is merely a banking regulation. In 7 *C. J.* 769, Sec. 607, it is said: "This liability is created for the sole benefit of creditors, and is held to arise purely by force of statute and not to be contractual in its nature". In this State the very existence of a bank is contingent upon its being subject to a stockholder's liability in addition to the payment for the stock, and this liability has been declared in all of the cases cited to be contractual in its nature and enforceable in the manner provided. It is not an arbitrary exercise of power by the Legislature, but a contractual obligation, which is a condition precedent to the conduct of a banking business by a corporation. Plaintiff's counsel have cited numerous cases to the effect that this is an arbitrary power in the Legislature, and that the liability is in the nature of a special or trust fund for the security of creditors generally. Our decisions are upon the theory, and they have so construed the language of our Constitution (*Hammond* v. *Straus, supra,* and *Colton* v. *Mayer, supra*), that there is individual responsibility of the stockholder to the creditor who became such during such individual stockholding, and that this liability is not ended by the transfer of his stock, and this is in line with the last clause of the constitutional provision which reads, "The books, papers and accounts of all banks shall be open to inspection, under such regulations as may be prescribed by law", and with what was said by Judge Boyd, already quoted, from *Murphy* v. *Wheatley, supra.*

All irregularities, if any, as to the time and method of presenting to the Court the matters herein considered were waived by the solicitors for the respective parties, and the questions submitted on their merits.

The order and decree of June 19, 1933, will be rescinded and revoked.

# IN THE CIRCUIT COURT FOR WASHINGTON COUNTY

**Equity.**

# No. 12777

STATE OF MARYLAND

*vs.*

HAGERSTOWN BANK AND TRUST COMPANY.

## OPINION OF COURT IN CIRCUIT COURT FOR WASHINGTON COUNTY.

SLOAN, *C. J.*, WAGAMAN, *A. J.*:

John J. Ghingher, Bank Commissioner, Receiver of the Hagerstown Bank and Trust Co., filed his petition wherein he states, that it is necessary in the liquidation of The Hagerstown Bank and Trust Co. that an assessment be made against all of the stockholders of that Company in an amount equal to the shares of stock respectively held by them. On this petition an order was passed, requiring each of said stockholders to pay to the said Receiver an amount equal to the par value of the share or shares of the capital stock of said Company held by him, unless cause to the contrary be shown. Notice was also required by said order to be given to each of said stockholders of the substance of the petition, together with a copy of the order. Answers were filed by numerous stockholders, denying the right of the Court to pass such an order. Hearing was had upon petition and answers, and such record evidence offered as was necessary to present the questions on their merits.

The Hagerstown Bank and Trust Co. was incorporated under the name of the Maryland Surety and Guaranty Co. by the Act of 1902, Chap. 298, the Charter amended by the Act of 1904, Chap. 215, and again amended and the name changed to Maryland Surety and Trust Company by the Act of 1908, Chap. 410. Later by amendment, under the general law its name was changed to the Hagerstown Bank and Trust Co.

The Act imposing stockholders' liability on trust companies was Chap. 109 of the Acts of 1892, Sec. 85L. The measure of liability under this section being what is commonly known as triple liability, or an assessment in addition to the par value of shares originally of 200 per cent., which was reduced to a double liability, or an additional 100 per cent by Chap. 101 of the Acts of 1904.

All the legislation which distinguished the liability of the stockholders of banks and trust companies has been repealed, and the Act of 1910, Chap. 219, Code, Art. 11, Sec. 72, is now applicable to both. The result is, there is now no difference as to rights and liabilities of stockholders in the two kinds of corporations.

What has been said in the opinion this day filed in the case of the Peoples Banking Company of Smithsburg, No. 12277 Equity, is equally applicable to the questions presented by the petitions and answers in this case, and the opinion in that case is adopted as the opinion in this.

Anything which was there said with respect to the liability of stockholders, whether they be stockholders of record at the time of the receivership or stockholders who had transferred their stock before the receivership, is, if anything, more clearly said by Chap. 410, of the Acts of 1908, amending the Charter of the Hagerstown Bank and Trust Co., because there is incorporated in that Act these words, "The liabilities of the stockholders shall at all times be determined by the laws of the State in force at the time the said liabilities may attach." This provision is exactly the construction put upon the Constitutional provision Art. 3, Sec. 39, and the statutes passed in pursuance thereof, by the cases mentioned in the opinion of the *Peoples Banking Company* case.

There is no point to any distinction between trust companies engaged in banking business and banks which are not engaged in a trust business. When a trust company engages in or is authorized to engage in and pursues the business of banking it is inescapably bound by the provisions of Sec. 39, of Art. 3, of the Constitution, and whether it be called a bank or a trust company makes no difference if it is engaged in a banking business. The difference in liability under the Act of 1892 was an additional liability put upon banks which engaged in a trust business.

Further discussion of the facts and questions involved in this case, in view of the opinion in the other case, becomes unnecessary and the petition of the receiver filed on the 16th day of January, 1935, will be dismissed.

# IN THE COURT OF APPEALS OF MARYLAND

**OCTOBER TERM, 1935**

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**GENERAL DOCKET**

## No. 61

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JOHN J. GHINGHER, BANK COMMISSIONER, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,

*vs.*

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND.

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**OPINION OF COURT OF APPEALS OF MARYLAND.**

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MITCHELL, *J.:*

On the 5th day of May, 1933, John J. Ghingher, then Bank Commissioner of the State of Maryland, was appointed receiver of The People's Banking Company of Smithsburg, hereinafter called the bank, by the Circuit Court for Washington County, Maryland, and assumed charge of the affairs of the bank in accordance with the provisions of Section 9 of Article 11 of the Code of Maryland, as supplemented by Chapter 46 of the Acts of 1933, commonly known as the "Emergency Banking Act," which latter Act took effect on March 4th, 1933.

On June 19th, 1933 a petition was filed by the receiver, which, in substance, set forth that the bank was originally incorporated on January 24th, 1910, under the provisions of Article 11, with a capital stock of $20,000, divided into

2,000 shares of the par value of $10 each; and that on January 13th, 1922, the original articles of incorporation of said institution were amended, whereby the capital stock was increased to the sum of $40,000, divided into 4,000 shares of like par value; all of which stock was outstanding at the time of the filing of the petition.

It was further alleged in the petition, that in the course of the liquidation of the affairs of the defendant bank, the Commissioner had ascertained, with absolute certainty, the existence of a deficiency between its assets and liabilities far in excess of $40,000, representing the approximate par value of the authorized and outstanding capital stock of the institution; and accordingly, it was prayed that an order be passed determining and adjudging that each stockholder of the bank be required to pay to the receiver a sum equal to the par value of the stock held by him; and finally, that the petitioner be authorized and directed to collect, and enforce payment thereof against the stockholders through appropriate legal proceedings.

On the date the petition was filed, the Court passed a summary order decreeing that each stockholder of the bank be required to pay to the receiver an amount equal to the par value of the share or shares of the capital stock of the institution held by him; and authorized and empowered the receiver to collect and enforce payment of the stock liability.

On February 15th, 1935, a petition was filed in the receivership proceedings, by Daniel E. Bachtell and others, in which it was set forth that the petitioners had been made defendants in a separate suit filed in said Court by the receiver on January 28th, 1935, for the purpose of recovering the statutory liability upon stock held by them in said bank.

The petitioners alleged that they had only recently acquired knowledge of the summary order passed against them; that they were advised that said order precluded them, and each of them, from making their respective defense on the merits, and thereby precluded any denial of the need for, or liability of the petitioners upon, the assessment made in the order; and, after setting forth that,

not having been made parties to the suit at the time of the passage of the order, they were taken by surprise, through the attempted enforcement against them, they further alleged as follows:

"That your petitioners are informed, believe and therefore allege that the various debts and liabilities of said The Peoples Banking Company of Smithsburg, Maryland, for the payment of which recovery is sought in the aforementioned equity cause, accrued against said bank at various times over a period of years, and that all of said debts and liabilities did not accrue during the time that all of your petitioners were alleged holders of the stock of said banking company.

"That said order was passed without any allegation or proof that your petitioners held stock in said The Peoples Banking Company of Smithsburg, Maryland, at the time or times when the various debts and liabilities of said banking company accrued against it.

"That said order was passed without any allegation or proof that the various debts and liabilities of said bank accrued during such time or times as your petitioners were alleged holders of stock of said banking company.

"That your petitioners are informed, believe and therefore allege that even though they should be held liable to an assessment for any payment of double liability upon the shares of stock alleged to be held by them, that your said petitioners are, if liable at all, which they do not admit, liable only under the provisions of the banking laws of Maryland, for such debts and liabilities of said bank as accrued during the respective periods during which they may be proved to have held stock therein.

"That the aforesaid order renders your petitioners liable as of course as alleged stockholders of said banking company, and likewise renders them, if liable at all, which your petitioners do not admit, liable for larger sums of money than they; if liable, are required by law to pay.

"That the statutes of Maryland, under and by virtue of which said order of assessment was passed, impair the obligation of contracts, are discriminatory and deprive your

petitioners of equal protection of the law, deprive your petitioners of property without due process of law, and otherwise contravene the provisions of the constitutions of Maryland and of the United States."

Finally, the petition prayed that the aforesaid order, passed on June 19, 1933, be rescinded, and that, in event the prayer for rescission be not granted, the said order be so modified as to permit defendant stockholders in said bank to offer any and all defenses which they, or any of them, might have to the proceeding against them.

Upon the aforegoing petition, a *nisi* order was passed on February 16, 1935, requiring the receiver to show cause why the petition should not be granted.

A second petition to intervene in the proceedings was filed by certain stockholders, alleging, on their part, payment of the assessments against them as stockholders as having been made through inadvertence and mistake and their intention to sue the receiver for the recovery of such payments. Said latter petitioners were, by order of the court passed on February 16, 1935, permitted to become parties to the suit.

On March 6, 1935, the receiver filed his answer to the aforegoing petition of February 15, 1935, in substance denying all the allegations of the petition.

For the purposes of the hearing, a stipulation was filed in the proceedings by counsel for the respective parties, as follows:

"That the times at which the various stockholders of the above named bank acquired their respective share or shares of its capital stock are correctly shown by the stock books of said company, which said stock books this honorable Court shall take and consider as having been duly offered in evidence and proved.

"That at the time of the closing of the aforesaid bank, the various stockholders who are petitioning this Court to strike out the assessment for double liability heretofore made against them, had on deposit in said bank the various sums of money shown on the lists and schedules of de-

posits herewith filed, which said deposits shall be taken as duly proved by competent evidence in this cause.

"That deposits which are now liabilities of said bank and were such at the time of its closing were made and its other liabilities incurred from time to time over a period of years, and that all of its said deposits were not made or its other liabilities incurred during the time that all of its stockholders of record at the time of its closing were such.

"That some of the shares of stock of said bank have been held and owned continuously by the same petitioner or petitioners from before June 1st, 1910, to the present time."

Attached to and forming a part of the stipulation is found a list of stockholders who became such prior to June 1, 1910, and a detailed statement of the respective amounts on deposit in said bank to the credit of the petitioning stockholders.

For the purposes of the hearing, it was admitted: "That without resort to the liabilities of stockholders the total assets of said bank will be insufficient to pay its liabilities to the extent of at least $40,000, and that unless recovery is made from stockholders of this bank, complete liquidation of its assets will leave more than $40,000 of its debts unsatisfied."

After a hearing, the chancellors, on July 31, 1935, passed a decree rescinding the order of June 19, 1933, whereby the receiver was authorized to enforce the liability of stockholders in said bank. The decree, however, was passed "without prejudice to such further proceedings as the receiver may be advised are proper, and in accordance with the opinion filed," which opinion, in substance, limits the respective liability of stockholders at the time of receivership to debts of the bank contracted during the period of such stock ownership. From that decree this appeal is taken.

The chief question presented for our determination, therefore, involves the point of time at which the double liability of a stockholder in a corporation engaged in banking, becomes fixed with respect to such stockholder, to the extent that he may be compelled to contribute his statu-

tory pro rata share towards a fund whence are to be paid, as far as possible, the debts of the corporation; the same being insolvent.

As a preliminary step in such inquiry, a brief retrospect, embracing the legislative and constitutional antecedents of the present law relating to this subject, may tend to assist in its elucidation.

Today, banks and trust companies in this state are governed by the same statutes. Earlier, the two classes of corporations were legislated upon under separate articles in the Code, one dealing with "Banks" and the other with "Corporations." Still earlier, so far as stockholders' liability is concerned, banks alone were subject to this protective provision for the benefit of creditors of such institutions. And farther yet in the past, upon the failure of a bank, its stockholders lost only what money they had actually invested, and could not be compelled to make up any deficiency that might develop in the final settlement of the bank's affairs.

Specifically, then, prior to the adoption of the Maryland Constitution of 1851, bank stockholders, in case of bank failure, were not liable to contribute to any one any part of the deficit represented by the bank's unpaid debts.

By the Constitution of 1851 (article 3, section 45), stockholders in new or rechartered banks were made liable, in the event of corporate insolvency, "to the amount of their respective share or shares of stock," in satisfaction of the bank's creditors.

The Constitution of 1864 (article 3, section 38) made no material change in this provision; none was made in the 1867 Constitution; and section 39 of article 3 now reads: "The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by law."

In 1868 the Legislature, by chapter 471, section 61 (now section 76, art. 23, Code), clarified the status of executors,

trustees, and similar persons holding stock for others, as to the effect of any liability thereon.

In 1892, by chapter 109, the Legislature added new sections to the "Corporations" article of the Code, one of which, section 85L of article 23, imposed liability for corporate debts upon stockholders in safe deposit, trust, and loan companies. Certain other corporations were also included, but subsequently eliminated. Members of a partnership being potentially liable for partnership debts to the extent of all they possessed, if required, and stockholders in banks being doubly liable in case of corporate insolvency, the Legislature evidently deemed it not inequitable that some such provision should be made to cover the class of stockholders named; and, accordingly, imposing a less onerous burden than that borne by partners but heavier than that of bank stockholders, it first fixed the liability of stockholders in safe deposit, trust, and loan companies at double the value of the stock owned, which, together with the amount of investment in stock, in reality was "triple liability."

Later, in 1904, by chapter 101, amending the Act of 1892, the liability of such investors was limited to an amount equal to the par value of the stock owned, thereby reducing the so-called "triple liability" to the present "double liability," the same as in the case of stockholders in banking corporations. And, under its provisions, the receiver of an insolvent corporation was clothed with authority to enforce the double liability of its stockholders. This enactment effected a change in the remedy of creditors in that prior thereto the claims of creditors had been enforced by an individual suit against a stockholder. The new law made the receiver, representing the interests of the corporation, as well as all its creditors, the proper party to initiate proceedings against all the stockholders for the enforcement of their statutory liability.

This was the situation at the beginning of 1908; and in that year chapter 153 was enacted, making minor changes in the act of 1904. At the same session, the Legislature, by chapter 240, section 40, added new language to the act of 1868, declaring that, except in the case of banks, for

which provision was made in the Constitution (section 39, art. 3), and except as provided elsewhere in the "Corporations" article (e.g., section 147, relating to trust, etc., companies, and section 77, requiring stockholders to complete payments on stock subscriptions, in certain contingencies), no stockholder should be held liable for corporate debts. The effect of this act was to make clear that the act of 1892 did not apply to banks, and to point to the Constitution as the source of bank stockholders' liability.

In 1910, by chapter 219, the Legislature revised the "Banks" article of the Code, repealed such of the provisions of the "Corporations" article as applied to trust companies, and, combining them with the bank provisions, changed the title of article 11 from "Banks" to "Banks and Trust Companies."

By virtue of this coalescence of statutes, the receiver of a bank, for the first time, was empowered to enforce the liability of its stockholders, collecting their contribution to the common fund, from which he would make distribution to the bank's creditors.

In view of the inauguration of this new system of liability enforcement, involving a change in the theories of recovery and a corresponding modification of the rules of evidence, the cases which had been decided during the existence of the old practice were no longer controlling.

True, the statutes construed in those cases, while then relating to corporations other than banks, have since become part of the banking laws. But the court was there considering an original legislative enactment, pure and simple, lacking any specific constitutional background, and was therefore bound to construe the same according to the principles of statutory construction.

The present law upon the subject of stockholders' liability being the same in the case of banks as in the case of trust companies, it might be argued that the trust company law having been construed before it became a part of the bank law, the effect of combining the trust company law with, and making it a part of, the bank law, should, under the doctrine of *stare decisis,* make mandatory the accept-

ance of prior judicial construction, in cases involving banks.

But it must be recalled that the trust company law dates from 1892, its receivership feature dates from 1904, and it was merged with the banking law in 1910. The law of 1910, so far as it related to banks, was but an amplified restatement of the constitutional provision, detailing in a legislative act an axiom of the organic law of the state which had existed for nearly sixty years before the Legislature placed it in the Code.

Therefore the analogy falls, for the reason that we have before us, not a simple act of Legislature, and, as such, open to construction under the rules of statutory interpretation, but, in reality, a basic provision of the State Constitution, as amplified in administrative detail by a subsequent act of the law-making body of this state.

The question, then, being one of constitutional and not statutory construction, and finding no case in which this section has been previously expounded, it is presented as one of first impression. Viewed in that aspect, the controlling force in its adjudication must be developed from an inquiry into the underlying purpose sought to be accomplished by its terms. One quickly concludes that purpose to be the protection of bank creditors. The debates of the Maryland Consitutional Convention of 1864, when this section (section 39, art. 3) was under discussion with a view to amendment, are affirmatively illuminating upon this point.

The object being apparent, and a doubt arising as to the method of its accomplishment, the resolution of that doubt depends upon the answer to the inquiry: Of a number of possible interpretations, which is best calculated to insure the rights of creditors and at the same time operate the least harshly upon those who must bear the burden of liability?

In the case at bar, two courses lie open:

(a) To hold liable all persons owning stock at the time when it first becomes apparent that the bank's normal assets are insufficient to meet its obligations and the first step is taken to enforce stockholders' liability.

(b) To hold liable those who owned stock at the times when the various transactions took place out of which arose the liabilities existing at the time of insolvency.

Arguments advocating either course are fraught with possibilities of inequity, injustice, and hardship upon someone.

The theory of holding former stockholders liable arose as a matter of necessity, in order to prevent a failure of the remedy made mandatory by the Constitution.

Originally, the enforcement of the double liability of bank stockholders presented some difficulty. The creditor was entitled to assert his claim, and the stockholder was bound to fulfill his obligation under the Constitution. This liability not being an asset of the bank, in the sense that the bank itself could collect from him, it became apparent that the creditor must proceed directly against the individual stockholder.

There was no actual contract, in the first instance, between stockholder and creditor; the contract being tangibly between the stockholder and the bank. Therefore, the creditor having a right of action and a source of liability from which his claim eventually was entitled to be satisfied, and the Constitution being silent as to the method of its enforcement, the law created the fiction of a contract between the creditor and the stockholder, for the purpose of enabling a suit, the result of which would be a fulfillment of the constitutional guaranty established for the protection of the public in its dealings with institutions chartered by the state to conduct a banking business.

The suit being brought upon this fictional contract, the trial thereof became subject to the rules of evidence in cases of contract; and, as a natural and logical consequence, the defendant could not be held liable for any claims against him which accrued at a time prior to his assuming the relation to the bank out of which arose the liability sought to be enforced. The courts felt bound to reject claims which did not arise during the period of stockholdership of the defendant; and from the numerous cases which were decided upon the basis of this principle, the doctrine of absolute nonliability of bank stockholders for debts occur-

ring at a time when they did not occupy that relation to the bank came to be considered the settled law of this state in suits by creditors against individual stockholders.

It will be observed, however, that the Constitution does not fix the maximum liability to which stockholders in a banking institution, organized under the authority thereof, may be subjected; it does, though, fix the minimum liability of such stockholder, which, under its mandate, shall be "to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise." Nor does it limit the liability of stockholders to such debts as may have been incurred by the bank during the respective period of stock-ownership. It creates a liability, as an incident to stock-ownership in a banking corporation, for all its debts; and it is nowhere apparent that it was the intention of the framers of the Constitution to place upon creditors of an insolvent bank, or upon a receiver of its affairs, the insurmountable burden of proving, from day to day, and perhaps over a long period of years, the exact financial status of a banking corporation, as a condition precedent to the recovery of liability.

As we have observed, over a long period of years the Legislature took no affirmative action upon the constitutional provision, and meanwhile courts were left to deal with that provision without statutory amplifications. But, since the Legislature of 1910, in the exercise of its inherent authority, enacted chapter 219, now found in the Code under section 72 of article 11, courts of this state must deal with the original constitutional provision in the light of the legislative enactment, and, whenever the latter is not in conflict with the former, their plain duty is to give full force and effect to the statute. That statute is explicit and mandatory. It provides: "Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. * * * And the liablity of such stockholders shall

be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation."

Construing the quoted portion of the aforegoing statute, and giving to the words used therein the ordinary acceptation of their meaning we must conclude that "stockholders" naturally mean those who are such at the time it becomes necessary to enforce liability. It cannot mean those who formerly held stock, because such persons ceased to be stockholders upon the assignment of their stock. Such a construction is not only reasonable, but it is fortified when applied in connection with Section 71M of the Emergency Banking Act of 1933, which, apparently being predicated upon the theory that liability of the transferor ceased upon the ordinary bona fide transfer of bank stock, especially provided as follows: "Nothing contained in this Act shall be construed to relieve any stockholder of record in any banking institution at the time of the passage of this Act, from the liability imposed by Section 72 of this Article. Any person who may be a stockholder at the commencement of said period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the receiver for the statutory assessment on said shares. The rights of indemnity and exoneration as between a stockholder as of the date of the beginning of said custody and his transferee and between subsequent transferees during said period shall not be affected by this provision, but the liability of such transferor shall terminate whenever the custody of the Bank Commissioner shall cease by reason of the exemption of the banking institution whose stock is so transferred, from the provisions of this Act as hereinbefore provided in Section 71A, or upon the cessation of the Bank Commissioner's custody by the expiration of the time limited in said section, whichever shall first occur."

Again, it must be remembered that the statute provides that the stockholders' liability shall be an asset of the corporation for the benefit of all the creditors and depositors, if and when necessary to pay its debts. This language does

not refer to persons who may have been creditors but are not now, but to those who are creditors now, and to all of them, regardless of when their rights accrued in relation to stock ownership.

One can readily visualize the vast detail of bookkeeping, the labyrinth of accounting, in which such proceedings might well become enmeshed, as a result of attempting to ascertain what were the precise liabilities of various stockholders over a period of years, involving a stupendous quantity of petty transactions and a review of many thousands of items found among the records of a bank, in an effort to determine the exact degree of liability of a particular defendant. Indeed, before the act of 1910, Judge Boyd, in *Murphy* v. *Wheatley*, 102 Md. 501, 515, 63 A. 62, reluctantly adhering to the old theory, based upon the fiction of a contract between creditor and stockholder, commented upon the regrettable consequences necessarily flowing therefrom.

But, when the act of 1910 merged the trust company law with the bank law and gave the bank receiver the power to enforce double liability against stockholders and make distribution to creditors, it swept away the fictional contract previously found necessary in order to achieve the object of the constitutional guaranty; and, the right of action no longer being one of the creditor in person against an individual stockholder but of the receiver against all the stockholders, a different theory of recovery was proper to be invoked.

In other words, the contract of the stockholder with the bank, not being a purely voluntary one, but being imposed upon him by the Constitution, was not to be restricted to such a narrow interpretation as that required when the suit was a personal one between the creditor and the stockholder. Under the fictional contract, the stockholder could be strictly held to nothing beyond the pale of his actual period of possession of the stock. Under the absolute contract between the stockholder and the bank, springing from the constitutional provision, his liability was a broad one, and included the debts of the bank as and when they reached the stage of enforceable claims against the bank,

regardless of the time when the particular transaction out of which the claim arose, had its inception.

The logic runs thus: The Constitution says the stockholder shall be liable for the bank's liabilities; he shall be liable when the bank is liable; his liability is concurrent with that of the bank. He shall be called upon to pay, when the bank is called upon. If the bank is never called upon, then his potential liability dies. If it is called upon, by reason of a liability ripening into an active claim, then the quiescent liability of the stockholder is quickened into life and his obligation to contribute becomes fixed and definite.

The statute, amplifying the Constitution, says such liability shall be an asset of the bank for the benefit of its creditors, if necessary to pay its debts. Therefore, until necessity demands, such liability remains in suspension, covering the entire body of stockholders, and, when invoked, it attaches to the stockholders; that is, those holding stock in the bank at the time of such invocation.

The adoption of this interpretation is susceptible of least criticism from the standpoint of justice and equity, and is more nearly in accord with that certainty and simplicity which should accompany the administration of law.

To hold the contrary view would engulf all concerned in a swirling flood of litigation, so lengthy, so tedious, and so costly that ultimately the inconclusive and discouraging nature of resort thereto would defeat the very end sought to be achieved by the basic law.

A further contention is made that, with respect to stockholders who were such before the act of 1910 took effect, their liability is still governed by the law as it stood before 1910, leaving them subject to suits by individual creditors for the enforcement of their claims, and that, so far as the act of 1910 is attempted to be enforced in that respect, it is unconstitutional, in that it takes away a remedy previously enjoyed by such creditors. But, in the view we have taken, the liability of a stockholder does not become enforceable until the bank's inability to pay the creditors is manifest; and, as the record indicates that such a contingency did not arise in the present case until long after

the passage of the act of 1910, there can be no force in this argument. Furthermore, even had the Legislature not reserved existing rights, as it did in that act, it is well settled that no one has a vested right in a remedy, and that the Legislature may change a legal remedy, so long as the one substituted is equally effective in coercive force with the one repealed. *Baltimore & O. R. Co.* v. *Maughlin*, 153 Md. 367, 138 A. 334.

In view of the broader field of contention between the respective parties to this suit, the question of the right of a depositor stockholder to set off his credit as a depositor of the bank against his liability as a stockholder of the bank, was not pressed in the argument before this Court. But, inasmuch as that question was referred to and dealt with in the carefully prepared opinion of the lower court, we deem it proper to dispose of it here.

In *Cahill* v. *Original Big Gun Ass'n*, 94 Md. 353, 50 A. 1044, 1045, 89 Am. St. Rep. 434, it is said: "The liability of the stockholder, then, under the statute, having been settled as a debt due from the stockholder to the creditor, there can be no valid reason, it seems to us, why a stockholder who is also a creditor should not be entitled, as a matter of equity, to set up as an equitable defense the debt of the bank to him against his own liability. Mr. Cooke, in his book on Corporations (section 225), says: 'It has been held that, where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholder cannot set off an indebtedness of the corporation to him. He must pay in what the statute requires, and then prove his claim against the corporation like any other creditor. But where the shareholder's liability by statute is immediate and personal and several, and any creditor may sue any shareholder, then the shareholder may set off a debt owing to him from the corporation, when he is sued by a corporate creditor.' In Beach, Priv. Corp. section 727, it is said: 'But if the statute imposes upon shareholders a personal liability to creditors, immediate and several, so that any creditor may institute an independent action against any shareholder for the enforcement of corporate debts, then a defendant shareholder may set off debts due from the company to himself.' In Tayl. Priv. Corp. section 732, it is

thus stated: 'When a single creditor can and does sue a shareholder at law to enforce the statutory liability of the latter, it is then competent for the shareholder to set off a debt owing him from the corporation.'"

The case from which the above quotation is taken is cited in the opinion of the lower court in justification of its favorable ruling for the allowance of a depositor stockholder's set-off in the instant case. We cannot agree with that conclusion (a) because we are not here dealing with a corporation charter which, as in the cited case, specifically provided that "The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise"; and (b) because that decision was rendered prior to the passage of the act of 1910 definitely declaring the liability of all stockholders to be an asset of the corporation, for the use and benefit of all creditors alike.

In *Poe on Pl. & Pr.*, vol. 1, section 613, it is said: "A set-off, technically, means a cross claim, and is confined to mutual debts between the plaintiff and defendant. * * * To entitle the defendant to make such a defense, he must not only have a right to receive the amount due him from the plaintiff, but his claim must be of such a nature that he can sue for and recover it in a court of law. * * * And it may be stated, in general terms, that to authorize a set-off, the debts must be mutual, must be between the parties in their own rights, must be of the same kind and quality, and be certain and clearly ascertained or liquidated."

Applying the above fundamental principles to the facts in the instant case, we are unable to differentiate between stockholders who are depositors and stockholders who are not. The former class stand in the dual capacity of debtors and creditors of the involved corporation, and should be so dealt with in the liquidation of its affairs.

For the reasons stated, the decree below will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Decree reversed, and cause remanded, with costs to the appellant.

IN THE COURT OF APPEALS OF MARYLAND

**OCTOBER TERM, 1935**

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**GENERAL DOCKET**

# No. 62

---

JOHN J. GHINGHER, BANK COMMISSIONER, RECEIVER FOR THE HAGERSTOWN BANK AND TRUST COMPANY,

*vs.*

STOCKHOLDERS OF HAGERSTOWN BANK AND TRUST COMPANY, A BODY CORPORATE.

---

Per CURIAM:

In this case, on facts similar to those stated in the opinion filed in the case of Ghingher, Receiver, *v.* Stockholders of the People's Banking Company of Smithsburg, 182 A. 558, the same questions of law have been presented, and the conclusions are necessarily the same.

For the reasons stated in that opinion, therefore, the decree below will be reversed, and the cause remanded for further proceedings in accordance with that opinion.

Decree reversed, and cause remanded, with costs to the appellant.

(8128-C)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

# No. 298

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND

*Appellants,*

*vs.*

WARREN F. STERLING, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG

AND

# No. 299

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

*Appellants,*

*vs.*

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, Etc.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

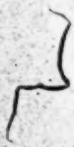
## BRIEF OF APPELLANTS


D. ANGLE WOLFINGER
CHARLES F. WAGAMAN
JOHN WAGAMAN

Attorneys for Appellants in No. 298

MARTIN V. B. BOSTETTER
C. WALTER BAKER
CHARLES F. WAGAMAN
DANIEL W. DOUB
LEVIN STONEBRAKER
JOHN WAGAMAN

Attorneys for Appellants in No. 299



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# SUPREME COURT OF THE UNITED STATES
## OCTOBER TERM, 1936

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## No. 298

---

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND

Appellants,

vs.

WARREN F. STERLING, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG

and

## No. 299

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

Appellants,

vs.

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, ETC.

---

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

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## BRIEF OF APPELLANTS

PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND

No. 298 Appeals, October Term, 1936.

The Peoples Banking Company of Smithsburg was incorporated under the General Corporation Law of Maryland on January

24, 1910, and operated as a going banking business from shortly after said date until June 29, 1931, when it closed its doors and ceased active operation of its business. The appellants are the owners of more than 2,000 shares of the capital stock of said bank outstanding when the same was closed and are creditors of said bank in an aggregate sum of more than $100,000.00. At least 345 shares of the capital stock of said bank were acquired by some of the appellants herein prior to June 1, 1910, the effective date of section 72 of Article 11 of the Code of Maryland (Appendix, p. 34), hereinafter referred to, which said shares have ever since been held and owned by said appellants (R. 17). Said Bank originally had a capital of $20,000.00 divided into 2,000 shares of the par value of $10.00 each. By amendment to the charter in 1922, said capital was increased by $20,000.00 divided into 2,000 additional shares of the par value of $10.00 each. The charter of said bank (R. 21) authorized it to conduct a general banking business, but did not authorize it to, and it never did, act as fiduciary or exercise any trust powers. On May 5, 1933, in proceedings instituted by the State of Maryland against said Peoples Banking Company of Smithsburg, on the equity side of the Circuit Court for Washington County, Maryland, John J. Ghingher, Bank Commissioner, was duly appointed receiver for said Bank (R. 3). On June 19, 1933, said Receiver filed a petition in said proceedings praying for and the Court thereon passed an order assessing the stockholders of record of said Bank 100% of the par value of the shares of stock of said bank held by them respectively, under the purported authority of the provisions of said section 72 of Article 11. Said order was passed solely upon said petition and affidavit, ex parte, and without evidence. (R. 3-6).

On February 15, 1935, the appellants herein filed petitions in the Circuit Court for Washington County, Maryland, praying that said order of June 19, 1933, might be rescinded and revoked (R. 7, 11).

Said petitions assigned as reasons therefor that said section 72 was unconstitutional and invalid as being contrary to the provisions of the Constitution of Maryland and contrary to the provisions of the Constitution of the United States in impairing the obligation of the appellants' contracts and depriving

them of property without due process of law. Said petitions further alleged that the order of Court assessing stockholders imposed upon them a liability different from that contractual liability which they had assumed upon the acquisition of their stock. (R. 9). And in said petitions said appellants claimed and asserted that they were liable, if liable at all, only for the debts and liabilities of said bank that were incurred while they were stockholders, and that no stockholder as such could be rendered liable for debts and liabilities of the bank incurred prior to his acquisition of stock. (R. 9).

On March 6, 1935, the receiver filed his answer to said petitions (R. 14).

At the hearing in the Circuit Court for Washington County the respective parties to this appeal stipulated and agreed as follows (R. 16):

1. That stockholders of the Bank acquired their respective share or shares of its stock at the time shown by the stock books of said company, which were duly offered in evidence and proved (R. 17).

2. That at the time of the closing of the bank the appellants had on deposit in said bank various sums of money shown on the schedules of deposits filed (R. 17) (Schedule, R. 18-21).

3. That deposits which are now liabilities of said Bank and were such at the time of its closing were made and its other liabilities incurred from time to time over a period of years and that all of its said deposits were not made or its other liabilities incurred during the time that all of its stockholders of record at the time of its closing were such (R. 17).

4. That some of the shares of stock of said bank have been held and owned continuously by the same appellants from before June 1, 1910, to the present time (R. 17), a list of which stockholders and their respective holdings was filed in evidence (R. 17-18).

5. That without resort to the liability of stockholders the total assets of said bank will be insufficient to pay its liabilities to the extent of at least $40,000.00 and that unless recovery is made from stockholders complete liquidation of its assets will leave more than $40,000.00 of its debts unsatisfied (R. 21).

All irregularities, if any, as to the time and method of presenting the questions raised were waived by all parties and said questions submitted on their merits (R. 39).

## THE HAGERSTOWN BANK AND TRUST COMPANY

No. 299 Appeals, October Term, 1936.

The Hagerstown Bank and Trust Company was incorporated by special act of the Legislature of Maryland by Chapter 298 of the Acts of 1902 under the name of Maryland Surety and Guaranty Company. Its charter was amended by Chapter 215 of the Acts of 1904 of said State and again by Chapter 410 of the Acts of 1908 and its name changed to the Maryland Surety and Trust Company by said last mentioned Act. By amendment under the General Law in 1928, the name of said company was further changed to The Hagerstown Bank and Trust Company (R. 27). Said bank first began the active operation of its business in June, 1908. (R. 23). The capital of said bank at the time of its closing was $550,000.00 divided into 55,000 shares of the par value of $10.00 each. Said bank was authorized by its charter to conduct and it did conduct a general banking and trust business and acted in various fiduciary capacities. Said bank was closed February 25, 1933, by a proclamation of the Governor of Maryland and has failed since that time to reopen for active business. On July 7, 1933, a conservator was appointed therefor, and on December 3, 1934, in proceedings instituted by the State of Maryland against the said Hagerstown Bank and Trust Company on the equity side of the Circuit Court for Washington County, Maryland, a receiver was appointed to liquidate the assets thereof. (R. 3).

On January 16, 1935, said Receiver filed a petition (R. 4) in said proceedings praying that the Court pass an order assessing the stockholders of record of said bank, under the purported authority of the provisions of said section 72 of Article 11 of the Code of Maryland.

Upon said petition said Court passed an order on said 16th day of January, 1935, that

> "each stockholder of the Hagerstown Bank and Trust Company be and he is hereby required to pay..... an amount of money equal to the par value of the share.....

held by him.....provided further, that no good cause to the contrary be shown....." (R. 7).

On or before the day named in said order, or duly authorized extensions thereof, the appellants herein, as well as other stockholders, filed answers showing cause against said order, assigning as their reasons therefor that said section 72 was unconstitutional and invalid as being contrary to the provisions of the Constitution of Maryland and as being contrary to the provisions of the Constitution of the United States in impairing the obligation of their contracts and depriving them of property without due process of law. Said stockholders also assigned as reasons therefor that the order of Court assessing stockholders imposed upon them a liability different from the contractual liability to which they had agreed upon the acquisition of their stock (R. 9). In said answers said appellants claimed and asserted that they were liable, if liable at all, only for the debts and liabilities of said bank that had been incurred while they were stockholders, and that no stockholder as such could be rendered liable for debts and liabilities of the bank incurred prior to his acquisition of stock.

At the hearing of this matter the respective parties stipulated and agreed as follows (R. 22):

1. That the appellants acquired their shares of stock at the times shown in the schedule filed with the stipulation (R. 23, 24).

2. That none of the stock outstanding at the time of the closing of the bank was issued prior to the amendment of its charter by the aforesaid Chapter 410 of the Acts of 1908 and that the first stock of said bank was issued on June 1, 1908, and that some of the shares then issued have been held and owned continuously by the same persons to the present time (R. 23).

3. That the appellants had, on the date of the closing of said bank and continuously to the present time, deposits therein and said appellants were and still are creditors of said Bank in the following amounts (R. 56):

F. Sydney Cushwa, $83.83; Susan F. Cushwa, no balance; Nora Miller Baker, no balance; C. Walter Baker, no balance; Gladys K. Bostetter, $243.76; Crystal Bostetter Hershey. $1.48; Ardella M. Newcomer, $122.42; Julia Hamilton Briscoe, $1,914.73; Julia Hamilton Briscoe, Trustee, $4.965.52.

4. That some of the shares of stock outstanding at the time of the bank's closing were transferred to the appellants at a time after some of the deposits were made and some of the liabilities incurred which were at the time of its closing and now are, part of the obligations of said bank (R. 23, 56).

5. That without resort to stockholders' liability the assets of the bank will be insufficient to pay its liabilities by at least $550,000.00 and that unless recovery is made from stockholders complete liquidation of its assets will leave more than $550,000.00 of its liabilities unsatisfied. (R. 23).

6. That the parties appellant in this cause, on the respective dates shown by the docket entries, filed answers in the Circuit Court for Washington County substantially identical to the answer of John S. Kausler set forth at length in the Record (R. 8) and that the Supreme Court of the United States shall take and consider the said answer of John S. Kausler as the answer of the respective parties appellant herein (R. 56).

Said Circuit Court for Washington County held said section 72 constitutional but that its proper construction placed upon stockholders liability only for the debts and liabilities of said banks which were incurred while individual stockholders held their stock.

The Court of Appeals of Maryland reversed said holding and, while determining said section 72 to be valid and constitutional, held stockholders of record upon the appointment of receiver were liable for all the debts and liabilities of said banks. Its opinions are officially recorded in the Maryland Reports, Vol. 169, pp. 678, 696.

Warren F. Sterling, Bank Commissioner of Maryland, has succeeded John J. Ghingher as Receiver for said banks.

## SPECIFICATION OF ASSIGNED ERRORS THAT WILL BE URGED

The appellants in both Nos. 298 and 299 will urge upon this Honorable Court all of the errors assigned in each of said cases.

## SUMMARY OF ARGUMENT.

1. The construction of section 72 of Article 11 of the Annotated Code of Maryland (Appendix, p. 34) whereby liability is placed only upon stockholders of record upon appointment

of a receiver results in said section being unconstitutional as impairing the obligation of the contracts of the appellants and depriving the appellants of their property without due process of law.

A. The liability of stockholders of banks and trust companies in Maryland is contractual in its nature. Uniform decisions in Maryland extending over a period of more than 60 years (and unbroken until the present cases) have determined the contractual liability of stockholders under the Constitution of Maryland and statutes substantially identical therewith to be only for such debts and liabilities as were incurred while they were stockholders.

B. This settled law was embodied in the contract of each of the appellants, whose substantive rights and liabilities cannot now be altered by a new statute or by a retrospective change in the construction of their contracts.

C. There is no reservation in said section 72 of the rights of such appellants, stockholders of Peoples Banking Company of Smithsburg, who acquired their stock before the adoption of said section, and under a statute which imposed upon them liability only for such debts and liabilities of the bank as were incurred while they were stockholders.

2. The constitutionality of said section and the rights of these appellants can be preserved by a proper construction of said section 72 whereby liability is placed upon stockholders of banks and of trust companies only for such debts and liabilities as were incurred during the time they held their stock.

Such construction is correct because:

A. Language similar to that of section 72 was given said construction by the Court of Appeals of Maryland prior to the adoption of said language by the people in the Constitution of Maryland in 1867 (the present Maryland Constitution).

B. Language similar to that of section 72 was given said construction uniformly and for many years by the Court of Appeals of Maryland prior to the adoption by the legislature of said section.

C. The Maryland legislature has refused to adopt any language which would limit liability to stockholders of record.

D. The reservation in section 72 of the rights of creditors and liabilities of stockholders of *trust* companies under

former statutes (different in amount only from the liability under the aforesaid "settled law"), and the failure to reserve rights of creditors and liabilities of stockholders of *banks* under former statutes which imposed liability upon stockholders only for such debts and liabilities as were incurred while they were stockholders express a legislative intent not to change the settled law.

All statutes cited in this brief are Acts of the General Assembly of Maryland unless otherwise specifically designated.

## ARGUMENT.

### A. SUPREME COURT HAS JURISDICTION TO CONSTRUE AND APPLY THE CONSTITUTION AND LAWS OF A STATE WHERE THE CONTRACT CLAUSE (Section 10 of Article 1) OF THE FEDERAL CONSTITUTION IS INVOLVED.

Section 72 as construed by the Court of Appeals of Maryland in these cases is declared valid and given effect only through a change of the settled construction of Section 39 of Article 3 of the Constitution of Maryland (Appendix, p. 30).

"The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected."

Coombes vs. Getz, 285 U. S. 434, 441.

And cases therein cited.

See also:

Northern Pacific Railway Co. vs. Duluth, 208 U. S. 583
King vs. Augusta, 277 U. S. 100
Bacon vs. Texas, 163 U. S. 207
Louisville Gas Co. vs. Citizens Gas-Light Co., 115 U. S. 683
Wright vs. Nagel, 101 U. S. 791

Louisville and Nashville Railroad Co. vs. Palmes, 109 U. S. 244

And where there exists in a state a settled construction of statutes or constitutional provisions under which contracts have been entered into, this Court says:

"Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it. Christy vs. Pridgeon, 4 Wall. 196, and Shelby vs. Guy, 11 Wheat. 361. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the Chief Justice in the recent case of Douglass vs. County of Pike, 101 U. S. 677, 687. 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' "

Louisiana vs. Pilsbury, 105 U. S. 278, 294.

## B. THE LIABILITY OF STOCKHOLDERS OF BANKS AND TRUST COMPANIES FOR THE DEBTS THEREOF IN MARYLAND IS CONTRACTUAL AND NOT PENAL IN ITS NATURE.

It " is not in the nature of a penalty like that in other sections imposed upon the trustees, managers, directors or other officers of the corporation for doing that which the statute expressly or by implication forbids, or the omission to do something which the law directs to be done.....it is, therefore, virtually and in effect a liability upon a contract and the mutual agreement of the parties, not indeed in form an express personal contract, but an agreement of equally binding obligation consequent upon, and resulting from, the acts and admissions, or implied assent of the parties."

Norris vs. Wrenschall, 34 Md. 492, 500 (1871).

In Coulbourn vs. Boulton, 100 Md. 350, 354 (1905), the Court of Appeals of Maryland, in a suit by a creditor of the City Trust and Banking Company against a stockholder thereof, held that the liability of the stockholder was contractual in its nature, saying:

"The first contention of the appellants is that the liability of the stockholders under the provision of law in question" (Acts of 1892, Chapter 109) "is not contractual, but penal in its character..... The case of Norris vs. Wrenschall, 34 Md. 492, would seem to be decisive of this question.... The cause of action was an implied contract arising out of the liability imposed by the statute....".

In Republic Iron & Steel Co. vs. Carlton, 189 Federal Reporter 126, 130, it is said:

"In Maryland the liability of a stockholder to a creditor of a corporation is one founded on contract..... It follows that the plaintiff has a right to insist that the obligation of that contract shall not be impaired by subsequent legislation. Nor may the State so change the remedy as substantially to impair or lessen the value of the contract."

To the same effect are:

Brant vs. Echlen, 59 Md. 351
Steel Co. vs. Equitable Society, 113 Md. 80
Colton vs. Mayer, 90 Md. 711

Hager vs. Cleveland, 36 Md. 476
Murphy vs. Wheatley, 102 Md. 501
Miners Bank vs. Snyder, 100 Md. 57
Basshor vs. Forbes, 36 Md. 154

Some of the aforesaid Maryland cases, as well as some hereinafter cited, determine the liability of stockholders of business corporations. But in the language of the Court of Appeals of Maryland in Murphy vs. Wheatley, 102 Md. 501, 519, where said Court, in passing upon the liability of stockhoders of a bank and trust company and citing many of the above cases as authority, held said cases to be applicable, saying:

"The character of the liability was the same and the main difference being that under it the stockholders were relieved from their obligations to creditors when all of the capital stock was paid."

Colton vs. Mayer, 90 Md. 711
Coulbourn vs. Boulton, 100 Md. 350

The foundation of this contractual liability of stockholders in Maryland is section 39 of Article 3 of the Constitution of Maryland (adopted in 1867 and still in force), which provides:

"The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by Law."

The nature and character of the rights and liabilities created or directed to be created by this constitutional provision have been fixed and uniformly applied for many years by decisions of the Court of Appeals of Maryland construing legislative enactments adopted pursuant to the aforesaid constitutional mandate and in language substantially identical therewith.

Among said acts is Chapter 206 of the Acts of 1870, which provides:

"The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective

share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this Act and every part of it may be altered from time to time or repealed, by the Legislature."

Said Act as continued in force by Chapter 501 of the Acts of 1886, (Appendix, p. 31) and by Chapter 483 of the Acts of 1906 (Appendix, p. 31) is the only general Act imposing liability upon bank stockholders until June 1, 1910. Even if said Act was not and never had been in force the liability of the appellants is fixed by Section 39 of Article 3 of the Constitution of Maryland which has been in force since 1867. And the language of said Act of 1870 and of said Constitutional provision are substantially identical.

Section 72 aforesaid took effect June 1, 1910 under the provisions of Section 31 of Article 3 of the Constitution of Maryland (Annotated Code of Public General Laws of Maryland, 1924 Edition, Volume 1, p. 91), (Appendix, p. 30) no other effective date having been provided by the Legislature in the Act itself.

The Constitution of Maryland and statutes passed pursuant thereto are not penal in the technical sense as they allow no recovery as a punishment but provide for stockholders' liability only to the extent required to compensate creditors for loss. Thus they impose liability contractual in its nature and the contract and due process clauses of the Federal Constitution protect the rights of creditors and stockholders thereunder.

Coombes vs. Getz, 285 U. S. 434

"It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States ..... ..... The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any

attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution."

Bernheimer vs. Converse, 206 U. S. 516
See also:
Hawthorne vs. Calef, 69 U. S. 10, 2 Wall. 10

C. STOCKHOLDERS' LIABILITY UNDER MARYLAND DECISIONS.

1. This contractual liability has been held to be payable directly to and enforceable by the creditors. In Colton vs. Mayer, 90 Md. 711, (1900), the charter of the South Baltimore Bank provided:

"The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all of its debts and liabilities upon note, bill or otherwise."

The receivers of said bank were attempting to recover from a stockholder under said charter provision. The Court of Appeals of Maryland said (p. 713):

"When the charter says, that the stockholders and directors of this corporation shall be liable to the amount of their respective shares of stock 'for all of its debts and liabilities', to whom were they to be so liable? Clearly not to the corporation for its own debts and liabilities, but manifestly they were to be liable to the creditors."

Miners Bank vs. Snyder, 100 Md. 57
Murphy vs. Wheatley, 102 Md. 501
Hammond vs. Straus, 53 Md. 1

2. And creditors could, therefore, waive said liability by agreement, when the contract was made, to look to the corporation alone.

Basshor vs. Forbes, 36 Md. 154
Murphy vs. Wheatley, 102 Md. 501

3. This contractual liability of each stockholder has always, prior to the instant cases, been held to be only for such debts and liabilities as were incurred by the bank while he was a stockholder.

Hammond vs. Straus, 53 Md. 1

This case (Hammond vs. Straus) construed a charter provision with which the language of section 39 of Article 3 of the Constitution of Maryland is substantially identical. Said case was decided at a time (1880) when Chapter 206 of the Acts of 1870, supra, p. 11, constituted a part of the general law of Maryland, and that Act likewise is substantially identical with said constitutional provision.

See also:

Matthews vs. Albert, 24 Md. 527
Norris vs. Wrenschall, 34 Md. 492
Hager vs. Cleveland, 36 Md. 476
Weber vs. Fickey, 47 Md. 196
Miners Bank vs. Snyder, 100 Md. 57
Murphy vs. Wheatley, 102 Md. 501

4. And the stockholder has always heretofore been held to be not liable for debts and liabilities of the corporation incurred or contracted prior to his acquisition of stock therein.

Murphy vs. Wheatley, 102 Md. 501

5. And the stockholder has always heretofore been held to be not liable for debts and liabilities of the corporation incurred or contracted after he sold or otherwise transferred his stock.

Matthews vs. Albert, 24 Md. 527
Hager vs. Cleveland, 36 Md. 476
Emmert vs. Smith, 40 Md. 123

6. And the contractual liability of the stockholder, being coexistent with the liability of the corporation, no act by the stockholder without the consent of the creditor could exonerate the stockholder from his liability which "is in no manner affected by the mere transfer of his stock."

Hager vs. Cleveland, 36 Md. 476, 493
Matthews vs. Albert, 24 Md. 527
Emmert vs. Smith, 40 Md. 123

7. And this contractual liability of the stockholder became determinate and irrevocable upon the contracting of debts by the corporation while the defendant was a stockholder.

Norris vs. Wrenschall, 34 Md. 492

8. And any stockholder compelled to pay more than his equal and ratable share of liability has always heretofore been held

entitled to sue in equity for contribution from all other stockholders who were liable to the same creditor.

Norris vs. Johnson, 34 Md. 485

Miners Bank vs. Snyder, 100 Md. 57

9. And under this contractual liability the stockholder has been permitted to set off a debt owing him from the corporation against his double liability.

It was so held in Cahill vs. Original Big Gun Assn., 94 Md. 353 (1902), and in Strauss vs. Denny, 95 Md. 690 (1902), where the corporate charter of the South Baltimore Bank, Chapter 294 of Acts of 1888 (Appendix, p. 32) provided:

"The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise."

The Maryland decisions heretofore cited in this brief were the settled law at least from and after 1866, and were so declared by the Court of Appeals of Maryland in Murphy vs. Wheatley, 102 Md. 501, 518, (1906). Said decisions were never overruled until the instant cases.

## D. THE MARYLAND CASES CONSTRUE SECTION 39 OF ARTICLE 3 OF THE CONSTITUTION OF MARYLAND.

All of the Maryland cases hereinabove cited construe statutes imposing liability upon stockholders in the same general language contained in section 39 of Article 3 of the Constitution of Maryland of 1867.

The aforesaid Maryland cases imposing liability upon stockholders of corporations having banking powers fix and determine the meaning of the Maryland Constitutional provision because they are constructions of statutes the language of which is identical or substantially identical with said Maryland Constitutional provision and passed pursuant to its mandate.

Said constitutional provision is embodied in each stockholder's contract because it is not within the power of the Legislature of Maryland to have exempted stockholders of a corporation having banking powers from the obligations of said provisions.

Mister vs. Thomas, 122 Md. 445

In Hammond vs. Straus, 53 Md. 1 (1880), where the charter of the Union Banking Company of Baltimore provided (Chapter 118 of the Acts of 1874):

"That the continuance of the corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise, and the books, papers and accounts of said corporation shall be open to the inspection of its stockholders upon application to the Board of Directors, as may be provided for in the by-laws of said company."

The Court said (p. 10):

"To entitle the plaintiff to recover in this action it was essential that three things should be made to appear: 1. That a corporation, such as that alleged, should have been created; 2. That the defendant was a stockholder therein; and 3. That the plaintiff was a creditor of the corporation, and that he became such while the defendant was stockholder."

The charter provision imposed liability in language practically identical with said Maryland Constitutional provision.

Likewise in Colton vs. Mayer, 90 Md. 711, Cahill vs. Original Big Gun Assn., 94 Md. 353, and Strauss vs. Denny, 95 Md. 690, liability was imposed upon stockholders only for such debts and liabilities as were contracted while they were stockholders pursuant to the authority of an Act (Chapter 294, Acts of 1888) which imposed liability in substantially identical language to that of said section 39 of Article 3 of the Maryland Constitution.

The adoption by the Legislature of Maryland of Chapter 206 of Acts of 1870, (Appendix, p. 30), of Chapter 118 of Acts of 1874, (Appendix, p. 32), and of Chapter 294 of Acts of 1888, (Appendix, p. 32), and of other Acts which imposed liability in language identical or substantially identical to the language of said Maryland Constitutional provision indicates a legisative intent to impose upon stockholders of banks the liability required by the Constitution of Maryland and no more.

The four cases last cited involved banks which were subject to said Constitutional provision. When, therefore, the Court of Appeals of Maryland construed those Acts the language of which was the language of said Constitution and upon the same

subject, it was necessarily decided that said Acts and said Constitutional provision have the same meaning.

Thus it appears that the Constitution of Maryland as expounded by the "settled law" required that the legislature give to the creditor as an asset of the creditor a direct and immediate liability to him of the stockholder who was such when his debt was contracted, unaffected by his subsequent transfer of his stock, and likewise required the legislature to impose such liability upon stockholders.

Although that settled construction of the Maryland Constitutional provision has been altered in the instant cases, such altered construction cannot affect the rights of these appellants.

"The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts."

Louisiana vs. Pilsbury 105 U. S., 278, 294

## E. SECTION 72 UNCONSTITUTIONAL AS CONSTRUED

The change in construction of section 39 of Article 3 of the Maryland Constitution, resulting in the imposition of a liability upon stockholders of record only under section 72 of Article 11, renders said section 72 unconstitutional insofar as these appellants are concerned as impairing the obligation of contracts and depriving the appellants of property without due process of law.

The Maryland Constitutional provision together with the settled construction thereof that stockholders are liable only for debts incurred while they are stockholders is embodied in the contract of each of the appellants.

Any statute which took away the benefit of such contract or obligation would be void as to the creditor and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution.

Bernheimer vs. Converse, 206 U. S. 516

See also:

Hawthorne vs. Calef, 69 U. S. 10, 2 Wall..10
Louisiana vs. Pilsbury, 105 U. S. 278
Coombes vs. Getz, 285 U. S. 434

The liability of stockholders under such contract is a property right of creditors.

"It is a debt under the statute due from the stockholder to the creditor, springing out of and co-existent with the contract between the corporation and the creditor."

Colton vs. Mayer, 90 Md. 711, 717
Coombes vs. Getz, 285 U. S. 434

And it is not within the power of the Legislature to deprive stockholder-creditors who are appellants here of that right. It is not, therefore, within the power of the Legislature to deprive creditors of all remedy, nor by statute to transfer the contractual right to and make the same an asset of the corporation, nor to wipe out the contractual liability of stockholders who were such when existing debts were contracted but who are no longer such, nor to increase the liability of record stockholders by rendering them liable for debts incurred prior to their acquisition of stock.

Insofar, therefore, as said Section 72 may be construed to limit the liability to stockholders of record and to make said liability an asset of the corporation, it impairs the obligation of the contract of the *stockholder* created by his purchase of stock, and deprives him of property without due process of law: By rendering him liable for debts incurred or contracted prior to his acquisition of stock; By depriving him of his equitable right of set-off where he is a creditor as well as a stockholder of the bank; By rendering him liable for more than he was liable for at the time of the creation of the contract; By rendering the record stockholder liable for debts for which past stockholders only contracted to pay; By denying the record stockholder any right of contribution against former stockholders; And by its failure to reserve the existing rights of creditors and liabilities of stockholders of banks under the existing law at the time of its passage.

Insofar, therefore, as said Section 72 may be construed to limit the liability to stockholders of record and to make said liability an asset of the corporation, it impairs the obligation of the contract of the *creditor* with the stockholder and deprives the creditor of property without due process of law; By depriving creditors of all remedy and making the contractual right an asset of the corporation; By depriving the creditor of all right and

remedy against stockholders who were such at the time he became a creditor of the corporation, but who are no longer stockholders; By reducing the aggregate possible liability enforceable against stockholders; By distributing equally and ratably to all creditors the fund collected, where any part of said fund is distributed to a creditor who did not become such while all of the record stockholders were such; By making distribution of the fund without regard to the times of the incurrence of debts and the acquisition of stock; And by its failure to reserve the existing rights of creditors and liabilities of stockholders of banks under the existing law at the time of its passage.

Any legislative attempt to increase the liability of the stockholder or decrease the right of the creditor under his contract as construed by the "settled law" must fail as impairing the obligation of contracts and as a deprivation of property without due process of law.

Coombes vs. Getz, 285 U. S. 434
Louisiana vs. Pilsbury, 105 U. S. 278
Bernheimer vs. Converse, 206 U. S. 516

Coombes vs. Getz, supra, also is authority to the effect that the provision in said Act of 1870: "and upon this further condition, that this Act and every part of it may be altered from time to time or repealed, by the Legislature" gives the Legislature no power to alter the liability of stockholders under a contract entered into prior to the repeal of said statute, and that acts passed pursuant to such a reserved power cannot be given retrospective effect.

F. IF, HOWEVER, SECTION 72 BE CONSTRUED TO IMPOSE LIABILITY IN ACCORDANCE WITH THE AFORESAID SETTLED LAW OF MARYLAND ONLY FOR DEBTS INCURRED WHILE STOCKHOLDERS WERE SUCH, AND IF IT BE FOUND THAT THE RECEIVER IS TO ENFORCE SAID LIABILITY IN THE PLACE OF CREDITORS, THE VALIDITY OF SAID SECTION AND THE CONSTITUTIONAL RIGHTS OF THESE APPELLANTS WILL BE PRESERVED.

"In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract and whether its obligation is impaired; and

if the decision of the question as to the existence of the alleged contract requires a construction of State constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well settled doctrine of this court."

Louisville and Nashville R. R. Co. vs. Palmes, 109 U. S. 244, 256.

Coombes vs. Getz, 285 U. S. 434.

1. Where words are used in a statute, which words at that time had a settled judicial significance, their insertion into the statute carries with them a legislative adoption of the previous and existing meaning unless the intent to change is evidenced by specific, clear and definite language.

". . . . the proposition conflicts with the settled rule that, where provisions of a statute had previous to their re-enactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary. . . .".

Heald vs. District of Columbia, 254 U. S. 20, 23.

Hecht vs. Malley, 265 U. S. 144.

"The attention of the Legislature having been twice called to the rulings of this Court in respect thereto, it is fair to assume that had it been their intention that the statute should apply only to public and not private streets, avenues and alleys, it would have availed itself of the opportunity in the repeal and re-enactment of the statute to have so stated specifically."

Smith vs. Baltimore, 120 Md. 143, 150.

"But if it be conceded that the statute" (Section 72) "which imposes it is economically unsound, harsh and inequitable in its operation, and imposes onerous exactions upon wholly innocent persons, nevertheless the final answer to such considerations is that it represents the long and firmly established policy of this State declared not only in its statutes but in its Constitution, which if changed, must be changed by the people themselves, and the Legislature, not by the Courts."

Robinson vs. Hospelhorn, 169 Md., 117, 140.

The people and the Legislature of Maryland have refused to change the stockholders rendered liable in the various cases and

statutes upon the subject. These stockholders are designated and described, their liability fixed, and said long and firmly established policy of Maryland expressed as follows:

Constitution of Maryland (1851), Section 45 of Article 3, (Appendix, p. 29) provides:

"..... the stockholders and directors shall be liable ..... for all its debts .....";

Constitution of Maryland (1864), Section 38 of Article 3, (Appendix, p. 29) provides:

"..... the stockholders shall be liable ..... for all its debts .....".

Constitution of Maryland (1867), Section 39 of Article 3, (Appendix, p. 30) provides:

"..... the stockholders shall be liable ..... for all its debts .....".

Chapter 206 of Acts of 1870, (Appendix, p. 30) provides:

"..... the stockholders ..... of each of said corporations shall be liable ..... for all its debts .....".

Chapter 338 of Acts of 1852, (Appendix, p. 31), (construed in Matthews vs. Albert, 24 Md. 527, Norris vs. Wrenschall, 34 Md. 492, Hager vs. Cleveland, 36 Md. 476, Norris vs. Johnson, 34 Md. 485 and Emmert vs. Smith, 40 Md. 123) provides:

"..... all stockholders of every company incorporated under this Act shall be ..... liable to the creditors ..... for all debts .....".

Chapter 325 of Acts of 1872, (Appendix, p. 31), (construed in Weber vs. Fickey, 47 Md. 196) provides:

"..... the stockholders ..... shall be ..... liable to creditors ..... for all its debts".

Chapter 118 of Acts of 1874 (Appendix, p. 32), (construed in Hammond vs. Straus, 53 Md. 1) provides:

"..... the stockholders ..... shall be liable ..... for all its debts .....".

Chapter 294 of Acts of 1888, (Appendix, p. 32), (construed in Colton vs. Mayer, 90 Md. 711, Cahill vs. Big Gun Assn., 94 Md. 353, Strauss vs. Denny, 95 Md. 690) provides:

"..... the stockholders ..... shall be liable ..... for all its debts .....".

Chapter 109 of Acts of 1892, (Appendix, p. 33), (construed in Murphy vs. Wheatley, 102 Md. 501) provides:

"Each stockholder shall be liable to the depositors and creditors ..... for double .....".

Chapter 219 of Acts of 1910 (Section 72), (Appendix, p. 34) provides:

"Stockholders of every bank and trust company shall be held individually responsible....for all....debts....of every such corporation....."

The attention of the people of Maryland having been called to the construction by the Court of Appeals of the words "stockholders" and "all debts" in the case of Matthews vs. Albert, supra, in 1866 (May 1st), it is fair to assume that in adopting the Constitution of Maryland of 1867 (voted on September 18, 1867), had they desired to limit liability to stockholders of record, they would have so stated specifically.

Likewise the attention of the Legislature of Maryland having been many times called to the construction by the Court of Appeals of the words "stockholders" and "all debts" in prior statutes imposing liability upon stockholders where these words are used without qualification, it is fair to assume that had it been their intention that section 72 should apply only to stockholders of record it would have availed itself of the opportunity in the repeal and reenactment in 1910 of Article 11 of the Code of Maryland to have so stated specifically.

It is submitted that there is in Section 72 no change by implication in the stockholders designated and the liability defined in the Constitution and earlier statutes, and there being no specific change, it follows that the stockholders liable and the extent of their liability must the same as under the settled law.

2. It follows that the imposition of liability under the National Banking Act only upon stockholders of record of the date of receivership, is neither precedent nor authority for such construction here.

National Banking Act rulings are inapplicable also because liability thereunder is penal and not contractual in its nature.

Christopher vs. Norvell, 201 U. S. 229
Keyser vs. Hitz, 133 U. S. 151

And this distinction has been drawn by the Court of Appeals of Maryland in Magruder vs. Colston, 44 Md. 349, (1876), and in Kerr vs. Urie, 86 Md. 72, 77, where it said:

"And the contracts which it is claimed she is liable on are not her contracts, but the contracts of the bank."

Magruder vs. Colston, supra, likewise called the attention of the Legislature of Maryland to the provision of the National Banking Act (U. S. Revised Statutes, section 5139, United States Code, Title 12, Section 52), (Appendix, p. 28) that "Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; . . . ." while later cases in Maryland hold to the contrary under the Maryland Constitution and statutes.

Therefore, although the Legislature of Maryland in 1910, passed section 72 which is similar in part to section 5151 of the U. S. Revised Statutes, (United States Code, Title 12, Section 63) (Appendix, p. 28) it refused to adopt language similar to the language of said section 5139 or any other language to provide that transferees shall succeed to the rights and liabilities of prior holders of such shares.

Thus, the refusal of the Legislature of Maryland to adopt language similar to Revised Statutes, section 5139 aforesaid, indicates that section 72 was not designed to limit liability to stockholders of record, or to alter substantive rights under the settled policy of Maryland.

3. Reservation in section 72 of rights of creditors and liabilities of stockholders of *trust* companies and failure to make any such reservation as to *banks* show that the Legislature intended section 72 to make no change in the law.

Said Section 72 concludes:

"Nothing in this section or article shall be construed to repeal or affect the existing rights of creditors or liabilities of stockholders of any trust company under the existing law at the time of the passage or taking effect of this article."

Such reservation was necessary to prevent creditors being deprived of property without due process of law and to prevent impairment of the obligation of stockholders' contracts under the Act of 1892 providing triple liability. It is significant that the legislature, knowing of this necessity and providing therefor

as to trust companies to prevent any question of this statute acting retrospectively and thus unconstitutionally on the rights of stockholders and creditors of trust companies, made no such reservation of the rights of creditors or liabilities of stockholders in banks under the Act of 1870. The conclusion to be drawn is that the legislature, having in mind the possible defect of retrospective operation of the statute as to banks, if said section changed the law, intended to pass a statute creating and fixing rights and liabilities identical with the rights and liabilities under the Act of 1870, with no change requiring a preservation of rights.

4. The provisions of section 72 construed in the light of the settled law of Maryland, effect no change in the liability of stockholders.

Section 72 provides that the liability shall be "individually." By all of the Maryland cases arising under acts similar in language to the Act of 1870 or to the Constitution of Maryland it has been held that the liability of stockholders is individual, immediate and personal.

Section 72 renders stockholders liable "equally and ratably and not one for another" and limits the liability to the par value of stock held. Prior to the passage of section 72 the principle of contribution applied between stockholders. Norris vs. Johnson, 34 Md. 485, Miners Bank vs. Snyder, 100 Md. 57. If one was compelled to pay more than his ratable liability he could compel contribution from other stockholders liable to the same creditors. As the law stood prior to section 72, therefore, each stockholder was liable to the extent of the par value of his stock but equally and ratably and not for another. The chief difference between section 72 and the former Acts is of procedure, namely, that the liability is now rendered equal and ratable by the equity court in its decree of assessment, whereas, formerly liability was rendered equal and ratable only upon the stockholders' suit for contribution. Miners Bank vs. Snyder, 100 Md. 57. Any other effect given this language would in some cases deprive the creditor of his right under the Maryland Constitution to a recovery equal to the par value of the stock held.

Said section declares the liability to be "an asset of the corporation for the benefit ratably of all depositors and creditors".

If literally construed this is in conflict with section 48, of the same Article (appendix, p. 35) which gives certain preferences in the distribution of the "assets" of such corporation. Thus under section 48, if said liability is an asset of the corporation, the fund might be diverted to a very limited class of creditors and the word "all" in section 72 rendered meaningless. It is therefore apparent that the word "assets" means a different thing in each of said sections 48 and 72. The use of the word "assets" in said section 72, therefore, is no reason for holding that the receiver is authorized to collect the liability of stockholders in any capacity except for the benefit of creditors under the settled law of Maryland, aforesaid.

Section 72, so construed, provides that creditors share ratably in the funds realized from stockholders who were such when their respective debts were incurred. Such distribution was held valid in Miners Bank vs. Snyder, 100 Md. 57, 72, where by statute all creditors were joined in a single suit against the stockholders, the Court saying:

"..... the funds recovered from each stockholder will be apportioned according to equitable principles to those creditors only to whom he is indebted.....A further commendable feature of the proceeding in equity provided by the present law is that it affords to the stockholders an opportunity to adjust their relative rights of contribution....."

Thus if it be held that said section 72 imposes liability upon stockholders in accordance with the settled law of Maryland it would seem that the right given to the receiver to sue was in substitution of the right of creditors to collect liability from individual stockholders only for debts contracted while they were stockholders.

5. The Maryland cases heretofore cited have never been overruled until the instant cases.

Neither the case of Mister vs. Thomas, 122 Md. 445, nor Lange vs. Ghingher, 168 Md. 353, nor Robinson vs. Hospelhorn, 169 Md. 117, pass upon the constitutionality of section 72 or limit the liability thereunder to stockholders of record. In the latter case the question of the liability of particular stockholders for debts created before they became such was specifically reserved for the future determination of the Court.

None of said cases determine what stockholders are liable nor for the benefit of what creditors they are so liable, because the limits of the liability were not necessary to be determined and were not raised or presented.

G. THE CORPORATIONS IN THE INSTANT CASE BOTH POSSESSED BANKING POWERS. THERE IS NO DISTINCTION IN LIABILITY OF STOCKHOLDERS OF BANKS WITH AND THOSE WITHOUT TRUST POWERS.

Section 39 of Article 3 of the Maryland Constitution is applicable to all corporations having banking powers.

Mister vs. Thomas, 122 Md. 445.

The first act imposing liability on stockholders of trust companies as such was Chapter 109 of the Acts of 1892, (Appendix, p. 33), under which the measure of liability was 200% of the par value of the stock held; but under this statute,

"The extent of the liability was measured by the amount of stock held by the stockholders at the times the debts were contracted, and stockholders were not liable for debts contracted before they became such."

Murphy vs. Wheatley, 102 Md. 501, 518.

Chapter 109 of Acts of 1892 was repealed by Chapter 101 of Acts of 1904 (Appendix, p. 33), which in turn was repealed by Chapter 153 of Acts of 1908 (Appendix, p. 33-34), all of which acts applied to trust companies only.

Said Acts of 1904 and 1908, substantially identical with the language of section 72, were successively in force from March 18, 1904 to June 1, 1910 and were in force coincidentally with Chapter 206 of Acts of 1870 aforesaid. Each of said acts was applicable to a corporation having both banking and trust powers. By the Act of 1910, now section 72, all former acts imposing liability upon the stockholders of banks and all acts imposing liability upon stockholders of trust companies were repealed. No point of distinction, therefore, can be made between trust companies engaged in banking business and banks which are not engaged in trust business.

It was sought to assess only stockholders of record upon the mere allegation that the assets of these banks are worth less than their liabilities to the extent of more than their respective

issues of capital stock; and if the contentions of these appellants as to the law be sustained, it does not appear that the receiver has in these proceedings alleged or shown any basis for liability upon the part of these appellants.

It is, therefore, respectfully submitted that the rulings and decrees appealed from should be reversed.

In the absence of their attorneys the Appellants are willing to submit their causes on brief.

Respectfully submitted,

D. Angle Wolfinger
Charles F. Wagaman
John Wagaman
Attorneys for Appellants in No. 298

Martin V. B. Bostetter
C. Walter Baker
Charles F. Wagaman
Daniel W. Doub
Levin Stonebraker
John Wagaman
Attorneys for Appellants in No. 299

# APPENDIX

Revised Statutes—Sec. 5139 (United States Code, Title 12, Section 51, Act June 3, 1864, c. 106, Paragraph 12,13 Stat. 102). "The capital stock of each association shall be divided into shares of one hundred dollars each," (Amendment added Feb. 25, 1927, c. 191, Paragraph 16, 44 Stat. 1233—"or into shares of such less amount as may be provided in the articles of association";) "and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

Revised Statutes—Sec. 5151 (United States Code, Title 12, Section 63, Act June 3, 1864, c. 106, Paragraph 12, 13 Stat. 102). "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of Chapter four of this Title."

Section 5151, quoted immediately above, remained in force and unamended until the following act, being act of Dec. 23, 1913, c. 6, Paragraph 23, 38 Stat. 273, (United States Code, Title 12, Section 64), was passed by the Congress of the United States: "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such assocation, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure."

Constitution of Maryland of 1851, section 45 of Article 3:

"The legislature hereafter shall grant no charter for banking purposes or renew any banking corporation now in existence, except upon the condition that the stockholders and directors shall be liable to the amount of their respective share or shares of stock in such banking institution for all its debts and liabilities upon note, bill or otherwise; and upon the further condition that no director or other officer of said corporation shall borrow any money from said corporation; and if any director or other officer shall be convicted upon indictment of directly or indirectly violating this article, he shall be punished by fine or imprisonment at the discretion of the court. All banks shall be open to inspection of their books, papers and accounts, under such regulations as may be prescribed by law."

Constitution of Maryland of 1864, section 38 of Article 3:

"The general assembly shall grant no charter for banking purposes, nor renew any banking corporation now in existence, except upon the condition that the stockholders shall be liable to the amount of their respective share or shares of stock in such banking institution for all its debts and liabilities upon note, bill

or otherwise, and upon the further condition that no director or other officer of said corporation shall borrow any money from said corporation, and if any director or other officer shall be convicted, upon indictment, of directly or indirectly violating this section, he shall be punished by fine or imprisonment at the discretion of the court. The books, papers and accounts of all banks shall be open to inspection under such regulations as may be prescribed by law."

Constitution of Maryland of 1867, section 39 of Article 3 (Annotated Code of Public General Laws of Maryland, 1924 Edition, Volume 1, page 96):

"The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by Law."

Constitution of Maryland of 1867, section 31 of Article 3 (Annotated Code of Public General Laws of Maryland, 1924 Edition, Volume 1, p. 91):

"No law passed by the General Assembly shall take effect until the first day of June next after the session at which it may be passed, unless it be otherwise expressly declared therein."

Sections 11 and 15 of Chapter 206 of the Acts of 1870 of the General Assembly of Maryland of 1870, p. 349 (banks).

Sec. 11. "And be it enacted, That the continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this Act and every part of it may be altered from time to time, or repealed, by the Legislature."

Sec. 15. "That this Act shall take effect from the date of its passage, and continue in force until the first day of January, eighteen hundred and eighty-five, and to the end of the next session of the General Assembly thereafter."

Section 1 of Chapter 501 of Acts 1886 (Acts of the General Assembly of Maryland of 1886, p. 840):

"That the provisions of the act of eighteen hundred and seventy, chapter two hundred and six, entitled an act to create State Banking Institutions, to enable the several banks in this State, State and National, to avail of the provisions thereof, be and the same is continued in force until the first day of January, ninneteen hundred and five, and to the end of the next session of the General Assembly thereafter."

Section 1 of Chapter 483 of Acts of 1906 (Acts of the General Assembly of Maryland of 1906, p. 951):

"That Section 32 of Article 11 of the Code of Public General Laws of Maryland of 1904, title "Banks", as enacted by the Acts of 1886, Chapter 501, be and the same is hereby repealed and re-enacted with amendments so as to read as follows:

32. The thirteen preceding sections shall continue in force until the first day of January, 1909, and to the end of the next session of the General Assembly thereafter."

Section 9 of Chapter 338 of the Acts of 1852, Acts of General Assembly of Maryland of 1852 (no page reference in volume).

"And be it enacted, That all the stockholders of every company incorporated under this act, shall be severally and individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock, fixed and limited by such company, shall have been paid in, one-half thereof in one year, and the other half thereof within two years, from and after the incorporation of said company, or such corporation shall be dissolved."

Section 59 of Chapter 325 of Acts of 1872 (Acts of the General Assembly of Maryland of 1872, p. 522).

"And be it enacted, That all the stockholders of any such corporation shall be severally and individually liable to the creditors of the corporation of which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by the corporation, until the whole amount of the capital stock fixed and limited by the cor-

poration shall have been paid in, and a certificate thereof made and filed, as prescribed in the following section of this article, which certificate may, however, be filed at any time after thirty days, mentioned in said section; but no stockholder shall be individually liable to the creditors of such corporation, except to the amount of his, her or their unpaid subscription to the capital stock; and the capital stock so fixed and limited shall be paid in, one-fourth thereof in one year, one-fourth in two years, one-fourth in three years, and one-fourth, or the balance, in four years from and after the incorporation of said company, or such corporation may be dissolved; provided, however, that it shall be lawful for the trustees, directors, or managers of any such corporation to collect and enforce the payment of all subscriptions to the capital stock, as other debts are collected after notice being given, as required by the sixty-fifth section of this article; and if suit shall be brought by the trustees, directors, or managers of any such corporation, against all delinquent stockholders for the full amount of unpaid subscriptions within four years from the incorporation of said company, such corporation shall not be dissolved; and provided, furthermore, that the provisions of this section shall not apply to any homestead or building association."

Section 14, Chapter 118 of the Acts of 1874, Acts of the General Assembly of Maryland of 1874, p. 158:

"And be it enacted, That the continuance of the corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise, and the books, papers and accounts of said corporation shall be open to the inspection of its stockholders upon application to the Board of Directors, as may be provided for in the by-laws of said company."

Section 18 of Chapter 294 of the Acts of 1888, Acts of General Assembly of Maryland of 1888, p. 482:

"And be it enacted, The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise; and upon this further con-

dition, that this act and every part of it may be altered from time to time or repealed by the legislature."

Section 85 L. of Chapter 109 of the Acts of 1892, Acts of General Assembly of Maryland of 1892, p. 156:

"85 L. Each stockholder" (of every safe deposit, trust, guaranty, loan and fidelity company) "shall be liable to the depositors and creditors of any such corporation for double the amount of stock at the par value held by such stockholder in such corporation."

Section 85 L. of Chapter 101 of the Acts of 1904 Acts of General Assembly of Md. of 1904, p. 179:

"The stockholders of every such corporation" (of every safe deposit, trust, guaranty, loan and fidelity company) "shall be held individually responsible equally and ratably and not one for another for all contracts, debts and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee shall not be personally subject to any liability on such stockholders, but the persons pledging the stock and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares. And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary, to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction; provided that this Act shall not affect the rights or remedies of any creditor or depositor under the existing laws of this State against the stockholders of any such corporation, who were liable to any such creditor or depositor at the date of the passage of this Act; and provided further, that nothing in this Act shall be considered as a construction by the Legislature of the law hereby repealed."

Section 85 L, Chapter 153 of the Acts of 1908, Acts of General Assembly of Maryland of 1908, p. 61:

"The stockholders of every such safe deposit, trust and loan company or association shall be held individually responsible equally and ratably and not one for another, for all contracts, debts and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee shall not be personally subject to any liability on such stockholders, but the person pledging the stock and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares. And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary, to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction; provided, that this Act shall not affect the rights or remedies of any creditor or depositor under the existing laws of this State against the stockholders of any such corporation, who were liable to any such creditor or depositor at the date of the passage of this Act; and provided further, that nothing in this Act shall be considered as a construction by the Legislature of the law hereby repealed."

Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland, (1924 Edition, Vol., 1, page 346), Section 68 of Chapter 219 of the Acts of 1910, Acts of the General Assembly of Md. of 1910, p. 29-30.

"Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee, shall not be personally subject to any liability on such stock, but the one pledging stock, and the estate and funds in the hands of such executor, administrator, guardian

or trustee shall be subject to the liability imposed upon the holders of said shares; and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction. Nothing in this section or Act shall be construed to repeal or affect the existing rights of creditors or liabilities of stockholders of any trust company under the existing law at the time of the passage or taking effect of this Act."

Section 48 of Article 11 of the Annotated Code of Public General Laws of Maryland, (1924 Edition, Vol. 1, page 338), section 47 of Chapter 219 of the Acts of 1910, Acts of the General Assembly of Maryland, p. 22:

"No bond or other security shall be required from any trust company for or in respect to any trust to which it shall be appointed executor, administrator, guardian, trustee, receiver, committee or depositary by the order of any court. In all cases in which such trust companies, whether incorporated under this article or by special act, shall be appointed, or shall be acting, as executor, administrator, guardian, trustee, receiver, committee, or in any other fiduciary capacity, they shall be responsible for losses of moneys or property received or held by them in any such character in the same cases and to the same extent as individuals so acting would be. Upon the dissolution of any such company by the Legislature, court or otherwise, or in case of its insolvency, all debts or liabilities due or owing by such corporation in any of said fiduciary capacities, shall be preferred in the distribution of the assets of such company to all debts or liabilities of any nature whatsoever, including salaries and wages of employees and other preferred debts or liabilities. The court having jurisdiction may make orders respecting such trusts, and require the corporation to render all accounts which such court or officer might lawfully require if such executor, administrator, guardian, trustee, receiver, committee or depositary were a natural person."

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CHARLES ELMORE CROPLEY
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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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# No. 298

---

STOCKHOLDERS OF PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,

*Appellants,*

*vs.*

WARREN F. STERLING, RECEIVER FOR PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND.

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

ELIAS B. HARTLE,
WILLIAM H. BOVEY,
*Counsel for Appellee.*

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# IN THE COURT OF APPEALS OF MARYLAND

**OCTOBER TERM, 1935**

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**GENERAL DOCKET No. 61**

---

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,

*vs.*

STOCKHOLDERS OF PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND.

---

## STATEMENT OF APPELLEE, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, OPPOSING JURISDICTION AND INCLUDING MOTION BY APPELLEE TO DISMISS OR AFFIRM.

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*To the Honorable the Justices of the Supreme Court of the United States:*

The Appellee, Receiver for the Peoples Banking Company of Smithsburg, Maryland, under the provisions of Rule 12, paragraph 3, and Rule 7, paragraph 4, of the Supreme Court of The United States, respectfully moves

(1) That the appeal in this cause be dismissed for lack of jurisdiction,

or

(2) That the decision of the Court of Appeals of Maryland be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument,

and states the following matter or ground therefor:

1. The statute claimed by the appellants to be repugnant to the Constitution of the United States is substantially in the language of the Federal Statutes covering the liability of stockholders in National Banks and the obvious validity is such that mere assertion of the appellants to the contrary would not confer jurisdiction.

2. The appellants state that their original petition asserted said Section 72 was contrary to the provisions of the Constitution of the United States and that the Circuit Court for Washington County, Maryland, held it constitutional, but applied it in a manner that gave them the result sought. On an appeal by the Receiver the Court of Appeals of Maryland also held said statute constitutional, but reinstated the assessment order that the lower court had revoked. The appeal now sought by the appellants is not really based on a complaint that said statute is unconstitutional, but rather on the application of a concededly constitutional statute.

3. Section 39 of Article 3 of the Constitution of Maryland is not self-executing. It simply says no banking charter shall be granted except upon the condition that the stockholders shall be liable to the amount of their shares "for all its debts and liabilities." Nothing is said as to whom payable or manner of payment.

4. None of the Maryland cases cited by the appellants construe the provision of the Maryland Constitution itself, but all the cases construe the statute alone and can not be taken as having held that the Maryland Constitution rigidly required any particular form or enforcement of liability.

5. The Court of Appeals of Maryland held in this case that the Maryland Constitution does not fix the maximum liability for stockholders in banks, but does fix the minimum liability. On January 9, 1906, the same proposition was held in

*Murphy* v. *Wheatley*, 102 Md. 501.

In that case the Court held that stockholders were liable for *twice* the par value of their stock, instead of just the par value alone, under the statute there being applied.

So that the appellants here might contend that they are liable to creditors who became such during the period that each stockholder held his stock, under the provisions of any and all former adjudications, and no further argument would be needed to show that the Legislature had the right to enact said Section 72 imposing an additional liability.

6. Said Section 72 fixed no liability upon existing stockholders at the time of its enactment in 1910. It created an asset of the corporation for the benefit of creditors "if necessary to pay the debts of such corporation." It is conditional and contingent and is dormant and unenforceable until it is needed to pay the debts of the corporation.

*Robinson* v. *Hospelhorn* (Md.), 179 Atl. 515, 522.

No stockholder had to continue holding his stock after enactment of said Section 72, and if he continued to hold his stock and receive the dividends and benefits, he should have no valid complaint when liability finally became fixed many years later.

7. The appellants are stockholders and here attempt to complain of being deprived of property without due process of law, although the creditors' right to individually sue the stockholders is what they really seem to complain of. The creditors would be the proper parties to attempt to assert any such alleged claim and if they are content to have the Receiver collect the stock liability for them, as provided by said Section 72, the stockholders are not the proper parties to appeal on this ground.

8. On January 15, 1914, the Court of Appeals of Maryland approved of the procedure of the stock liability being collected by the Receiver under the provisions of said Section 72.

*Mister* v. *Thomas*, 122 Md. 445.

At no time since the enactment of said Section 72, in 1910, has the Court of Appeals of Maryland held otherwise.

9. The appellants stress the decisions of the Court of Appeals of Maryland in cases arising under the Act of 1870. The concluding language of this Act states it to be "upon this further condition that this Act and every part of it may be altered from time to time or repealed, by the Legislature." Said Section 72 placed no heavier liability on a stockholder than an amount equal to the par value of his stock, as was the case under the previous Act. It merely altered and remodelled a remedy, which could not be objectionable.

*Baugher* v. *Nelson*, 9 Gill (Md.) 303

*Thistle* v. *Frostburg Coal Co.*, 10 Md. 144.

It is well settled that no one has a vested right in a remedy, and that the Legislature may change a legal remedy, so long as the one substituted is equally effective in coercive force with the one repealed.

*B. & O. R. R. Co.* v. *Maughlin*, 153 Md. 367.

The Constitution of Maryland provides that bank stockholders shall be made liable for *all* its debts and liabilities, and said Section 72 effects this result better than was the case under the decisions construing the former Act whereby the stockholder was not liable for *all* the debts of the bank, but only for the debts contracted while he was a stockholder. The intent of the Legislature in enacting said Section 72 may well be taken as a desire to correct the practice that thwarted the real Legislative intent contained in the previous Act and to insure fully carrying out the provisions of the Constitution of Maryland, even though said Section 72 would be construed as imposing an additional liability on stockholders.

Respectfully submitted,

ELIAS B. HARTLE,
WILLIAM H. BOVEY,
*Counsel for Appellee.*

Service acknowledged this 27th day of July, 1936.

D. ANGLE WOLFINGER,
CHARLES F. WAGAMAN,
JOHN WAGAMAN,
*Counsel for Appellants.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

# No. 299

STOCKHOLDERS OF HAGERSTOWN BANK AND TRUST COMPANY,

*Appellants,*

*vs.*

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

ELIAS B. HARTLE,
ROBT. H. MCCAULEY,
J. LLOYD HARSHMAN,
*Counsel for Appellee.*

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# IN THE COURT OF APPEALS OF MARYLAND

**OCTOBER TERM, 1935**

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**GENERAL DOCKET No. 62**

---

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY,

*vs.*

STOCKHOLDERS OF HAGERSTOWN BANK AND TRUST COMPANY, A BODY CORPORATE.

---

## STATEMENT OF APPELLEE, JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, AS TO JURISDICTION.

---

The appellee contends that there is involved in this case no question of the validity of a statute on the ground of its being repugnant to the Constitution of the United States, although such an argument was made when the case was heard in the Court of Appeals of Maryland.

The basis of the contention of the appellee is a follows:

1. UNDER THE ADMITTED FACTS OF THE CASE NO CONSTITUTIONAL QUESTION AS TO THE RIGHTS OF STOCKHOLDERS OR DEPOSITORS COULD BE INVOLVED, FOR THE FOLLOWING REASONS:

(a) The statute in question, in so far as the same determines the liability of stockholders of banks doing a trust

business, has been in force in Maryland since March, 1904, in identical terms as the statute which is now in question, the present statute being Chapter 219 of the Acts of the General Assembly of Maryland of 1910, and using the same language as contained in Chapter 101 of the Acts of 1904, except that the Acts of 1910 make the statute applicable both to banks and trust companies.

Acts of General Assembly of Maryland:

Acts of 1904, Chapter 101, effective March 18, 1904;

Acts of 1908, Chapter 133, effective March 30, 1908;

Acts of 1910, Chapter 219, Section 68, effective June 1, 1910; codified as Section 72 of Article XI of Annotated Code of Public General Laws of Maryland, 1924 Edition.

The statute law of Maryland relating to the liability of stockholders of banks doing a trust business has, therefore, remained unchanged from March, 1904, down to the present time.

(b) The Hagerstown Bank and Trust Company from the date of its organization conducted a trust business, as well as a banking business.

Record, page 4; Record, page 27;

Acts of General Assembly of Maryland of 1908, Chapter 410, effective April 6, 1908.

(c) No deposits were made with the Hagerstown Bank and Trust Company, and none of its capital stock was issued until it organized and began business in June, 1908.

Record, page 23.

(d) Every person becoming a stockholder or creditor of the Hagerstown Bank and Trust Company must be held to have done so with full knowledge and subject to all the conditions and liabilities affecting them, as contained in

Chapter 101 of the Acts of 1904, imposing the present form of liability complained of in this case.

Consequently, no stockholder or creditor of the Hagerstown Bank and Trust Company can complain that the provisions of the statute in question constitute an impairment of his contract with the corporation or in any other way operated in derogation of his constitutional rights.

2. THE EFFECT OF THE DECISION OF THE COURT OF APPEALS OF MARYLAND, APPEALED FROM IN THIS CASE, WAS TO DECLARE THAT THE STATUTE IN QUESTION WAS A VALID EXERCISE OF THE POWER OF THE LEGISLATURE TO DEFINE AND IMPOSE THE LIABILITY OF STOCKHOLDERS OF BANKS AND TRUST COMPANIES.

(a) There is no question in Maryland as to the power of the legislature to impose additional liabilities on stockholders of banks and trust companies over and above the minimum liability made mandatory by the Constitution of the State of Maryland.

*Murphy* v. *Wheatley*, 102 Md. 501.

(b) The Maryland constitutional provision relating to the liability of stockholders of banks has never been construed until the decision in the instant case, from which this appeal was taken, in which case the Court of Appeals of Maryland used the following language:

> "We have before us not a simple Act of the Legislature, and as such, open to construction under the rules of statutory interpretation, but, in reality a basic provision of the State Constitution, as amplified in administrative detail by a subsequent act of the law-making body of this State. The question, then, being one of constitutional and not statutory construction, and finding no case in which this section has been previously expounded, it is presented as one of first impression. Viewed in that aspect, the controlling force in its adjudication must be developed from an inquiry

into the underlying purpose sought to be accomplished by its terms." * * *

"It will be observed, however, that the Constitution does not fix the maximum liability to which stockholders in a banking institution, organized under the authority thereof, may be subjected; it does, though, fix the minimum liability of such stockholder, which, under its mandate, shall be 'to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise.' Nor does it limit the liability of stockholders to such debts as may have been incurred by the bank during the respective period of stock ownership. It creates a liability, as an incident to stock ownership in a banking corporation, for *all* its debts; and it is nowhere apparent that it was the intention of the framers of the Constitution to place upon creditors of an insolvent bank, or upon a receiver of its affairs, the insurmountable burden of proving, from day to day. and perhaps over a long period of years, the exact financial status of a banking corporation, as a condition precedent to the recovery of liability."

(c) The Maryland statute imposed liability upon the stockholders of banks and trust companies in language almost identical with the Federal statute imposing liability upon stockholders of National Banks.

U. S. Revised Statutes, Section 5151.

Acts of Congress, June 3, 1864, c. 106, par. 12.

Acts of Congress, December 13, 1913, c. 6, par. 23.

3. A CAREFUL ANALYSIS OF THE OPINION OF THE COURT OF APPEALS OF MARYLAND IN THE INSTANT CASE DISCLOSES NO CHANGE OR LIMITATION UPON ANY RIGHTS WHICH CREDITORS OR STOCKHOLDERS OF BANKS AND TRUST COMPANIES MIGHT HAVE UNDER THE CONSTITUTION OF MARYLAND.

(a) The decision in the instant case appealed from does not hold that the statute in question (Article 11, Section

72, Maryland Code 1924) abrogates any liability of stockholders or impairs any rights of creditors which may exist under the Maryland Constitution.

For the reasons above assigned, we respectfully submit that the Supreme Court of the United States should not take jurisdiction of this case and, therefore, move that the appeal be dismissed.

ELIAS B. HARTLE,
ROBT. H. MCCAULEY,
J. LLOYD HARSHMAN,
*Counsel for Appellee.*

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Supreme Court, U. S.
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CHARLES ELMORE CROPLEY

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

---

## No. 298

---

STOCKHOLDERS OF PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, APPELLANTS,

*vs.*

WARREN F. STERLING, RECEIVER FOR PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, ETC., APPELLEE.

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

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## BRIEF OF APPELLEE

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ELIAS B. HARTLE,
WILLIAM H. BOVEY,
Counsel for Appellee in No. 298.

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# SUPREME COURT OF THE UNITED STATES
## OCTOBER TERM, 1936

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# No. 298

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STOCKHOLDERS OF PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, APPELLANTS,

*vs.*

WARREN F. STERLING, RECEIVER FOR PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, ETC., APPELLEE.

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

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## BRIEF OF APPELLEE

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The Opinion of The Circuit Court For Washington County, Maryland, is set forth in the Record, Page 27, and is not reported elsewhere.

The Opinion of the Court of Appeals of Maryland is reported in 169 Md. 678 under the title of "Ghingher vs. Bachtell". Mr. Sterling has since succeeded Mr. Ghingher as State Bank Commissioner and Receiver. Mr. Tiffany, State Reporter, has certified that the words "minimum" and "maximum" in the first sentence of the first paragraph in 169 Md., page 690, differ from their position in the original opinion and were by mistake transposed for the printing. Chief Judge Bond has certified that the sentence as printed in 182 Atl., page 563, is correct. The Opinion is correctly printed in the Record, page 43.

## STATEMENT OF THE CASE

The Peoples Banking Company of Smithsburg, Maryland, was incorporated under the General Laws of the State of Maryland on January 24, 1910, and operated as a going banking business from shortly after said date until some date in 1931, not later than the month of September, 1931, when it ceased doing business. Article 2 of the Certificate of Incorporation (R. 22) states that the corporation is formed "to transact such business as is set out by the terms and conditions in these Articles of Incorporation and in the by-laws of said corporation which may be hereafter adopted, subject to all the conditions in the Public General Laws of Maryland, applicable to a corporation of this charter OR THE AMENDMENTS THERETO WHICH MAY HEREINAFTER BE ENACTED" (Capitals ours). On January 10, 1922, the Certificate was amended whereby the capital stock was increased from $20,000.00 to $40,000.00 (R. 25), divided into 4,000 shares of the par value of $10.00 each. John J. Ghingher, Bank Commissioner, was appointed Receiver of said Bank on or about May 5, 1933, by the Circuit Court For Washington County, Maryland. Warren F. Sterling has since succeeded John J. Ghingher as Bank Commissioner and has been duly appointed Receiver of this Bank in place of the said John J. Ghingher. On Petition of the Receiver (R. 3) a final Order of Court was passed on June 19, 1933, (R.6) decreeing that each stockholder of the Bank be required to pay to the Receiver an amount of money equal to the par value of the stock in the bank held by him and further authorizing and empowering the Receiver to collect said sums and enforce payment thereof by appropriate legal proceedings. Subsequent to the passage of the assessment Order of June 19, 1933, the Receiver upon several occasions mailed notices to the record stockholders of said Bank notifying them of said assessment and calling upon them to pay the same (R. 21). Many stockholders paid to the Receiver the amount of their stock liability, as set forth in Sec. 3 of the petition of Earl R. Bachtell, et al, (R. 12). Pursuant to an Order of Court passed December 26, 1934, the Receiver filed suit against delinquent stockholders on December 28, 1934, in No. 12,817 Equity in the Circuit Court For Washington County, Maryland (R. 21). (This Equity cause has since been dismissed and a separate suit at law filed against each de-

linquent stockholder). Petition to rescind assessment Order of June 19, 1933, was filed February 15, 1935, (R. 7) and Answer thereto was filed March 6, 1935, (R. 14). After due hearing, the Circuit Court For Washington County, Maryland, on July 27, 1935, filed an Opinion (R. 27) and on July 31, 1935, filed a Decree (R. 40) revoking and rescinding the assessment Order of June 19, 1933. After due hearing on an appeal taken by the Receiver, the Court of Appeals of Maryland, on January 22, 1936, filed an Opinion (R. 43) and on February 20, 1936, filed a Decree (R. 58) reversing the Decree dated July 31, 1935, of the Circuit Court For Washington County. The original assessment Order of June 19, 1933, (R. 6) was thereby revived and restored.

## SUMMARY OF ARGUMENT.

1. SECTION 39 OF ARTICLE III OF THE CONSTITUTION OF MARYLAND PROVIDES THAT

> "The General Assembly shall grant no Charter for Banking purposes . . . except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; . . . . "

2. MARYLAND ACTS OF 1870, SEC. 11 OF CHAP. 206, provided

> "And be it enacted, That the continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; AND UPON THIS FURTHER CONDITION, THAT THIS ACT AND EVERY PART OF IT MAY BE ALTERED FROM TIME TO TIME, OR REPEALED, BY THE LEGISLATURE." (Capitals ours).

3. Several later Statutes were passed applicable to trust companies, but the above act of 1870 was the only Act pertaining to banks alone until June 1, 1910, the effective date of SEC. 72 OF ARTICLE 11 OF THE MARYLAND CODE, which provides

> "Stockholders of every bank and trust company shall be

held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock,—and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the Order of a Court of competent jurisdiction....."

4. SEC. 71 M, CHAP. 46, OF THE MARYLAND ACTS OF 1933 (sometimes referred to as "Emergency Banking Act") provides

"Nothing contained in this Act shall be construed to relieve any stockholder of record in any banking institution at the time of the passage of this Act, from the liability imposed by Section 72 of this Article. Any person who may be a stockholder at the commencement of said period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the receiver for the statutory assessment on said shares...."

5. Section 39 of Article III of the Maryland Constitution is not self-executing. It does not say that the stockholders of a bank ARE liable. It simply says the General Assembly shall not grant any Charter without making them liable. It fixed a minimum liability that the Legislature had to impose by charter or general statute, but it did not fix the maximum liability that could be so imposed.

6. Section 11 of Chap. 206 of the Maryland Acts of 1870 imposed by General Statute a liability on bank stockholders to the extent of the par value of the shares. It did not state to whom the liability was, or how it was to be enforced.

Section 85L of Chap. 109 of the Maryland Acts of 1892 imposed on stockholders in trust companies (which are also banks, in that they possess banking powers) a liability for DOUBLE

the par value of their stock. This act made the liability to the depositors and creditors.

Sec. 85L of Chap. 101 of the Maryland Acts of 1904 imposed on stockholders in trust companies a liability for the par value of their stock and made the liability an asset of the corporation and enforceable by a receiver. The language of this Act is practically the same as Sec. 72 of Art. 11 of the present Maryland Code.

7. Sec. 72 of Art. 11 of the Maryland Code places no heavier liability on a bank stockholder than that of the par value of his shares, the same as the extent of the liability in Sec. 11 of Chap. 206 of the Maryland Acts of 1870. The later Act merely altered and remodeled a remedy, providing a new and adequate and efficacious remedy in substitution for that which it superseded.

Those of the Appellant stockholders who acquired their stock shortly before the present liability statute became effective on June 1, 1910, held their stock during practically the entire period the bank operated and obviously held their stock when all debts of the bank were contracted. They would be liable for the full par value of their stock under the old statute. The present statute simply makes the Receiver the one to enforce the liability instead of individual creditors who became such during the period of stock ownership.

Those who acquired their stock after the present liability statute became effective on June 1, 1910, assumed the liability under the present statute when they became stockholders.

8. The Court of Appeals of Maryland has held that the character of stockholders' liability under statutes applicable to business corporations is the same as the character of liability under the bank and trust company statutes (Colton vs. Mayer, 90 Md. 711, 715; Murphy vs. Wheatley, 102 Md. 501, 519).

The validity has been upheld of a statute changing the remedy for enforcing statutory liability against stockholders in business corporations and making the liability enforceable in one equity proceeding whereby the amount recovered should be divided among the creditors pro rata, in place of the former statute whereby each creditor could sue a stockholder who was such at

the time the debt to the creditors was contracted (Pittsburgh Steel Co. vs. Baltimore Equitable Society, 113 Md. 77).

The Supreme Court of the United States sustained the Court of Appeals of Maryland in the above case and held that the obligation of contract was not impaired.

Pittsburgh Steel Co. vs. Baltimore Equitable Society, 226 U. S. 455; 33 S. Ct. 167.

9. All of the Maryland cases previously decided construed provisions of the statute in effect at the time the cases were instituted and no cases have previously construed the effect of the Maryland Constitutional provision. The Maryland Court of Appeals in this case stated (R. 51) it to be the first time the Constitutional provision has been considered.

## ARGUMENT

On June 1, 1910, Sec. 72 of Art. 11 of the Maryland Code (Summary, Par. 3) became effective and made bank stockholders liable for the par value of their stock to the Receiver, if necessary to pay the debts of the corporation. The Peoples Banking Company of Smithsburg had been incorporated earlier in that same year. Sec. 39 of Art. III of the Maryland Constitution (Summary, Par. 1) is contained in the Constitution adopted in 1867. The Constitutional provision is not self-executing. The language places a prohibition upon the General Assembly and forbids it to charter a bank except upon the condition that THE GENERAL ASSEMBLY impose the liability upon the stockholders to the extent of the par value of the shares. The provision in the Constitution does not say that the stockholders of a bank ARE liable. It simply says the General Assembly shall not grant any Charter without making them liable.

The Legislature could impose the liability mentioned in the Constitution by Special Charter or by Statute applicable to all banks. The Maryland Acts of 1870, Sec. 11 of Chap. 206 (Summary, Par. 2) provided a general statute imposing the liability on the stockholders and directors of banks, but it did not state to whom the liability was, or how it was to be enforced. As The Maryland Court of Appeals stated in this case (R. 52), there was no actual contract between stockholders and creditor. A liability was created and the Courts were forced to devise some

foundation for suits brought to enforce the liability and the "fictional" contract theory was invoked. In the dissenting opinion in COOMBES vs. GETZ, 285 U. S. 434, 52 S. CT. 435, reference is made that "The Supreme Court of California has said that the liability thus created is contractual, but only in a qualified sense, as the expression of a legal fiction, is the statement true,...."

From time to time Maryland cases were decided solely upon the statute then in effect. None of the Maryland cases construed the effect of the Constitutional provision. In some of the cases the Court recognized the right of the Legislature to change the statutory liability, as long as the minimum liability mentioned in the Constitution was maintained. It was held in MISTER vs. THOMAS, 122 MD. 445, 457, that where the charter of a corporation granted it power to do a banking business, it was not within the power of the Legislature to exempt stockholders from liability mentioned in the Constitution. All trust companies have banking powers and therefore are subject to the Constitutional provision.

While MURPHY vs. WHEATLEY, 102 MD. 501, (1906) applies to trust companies, as to which Maryland Acts of 1904, Sec. 85L of Chap. 101, made the liability to the Receiver instead of to the creditors, it upholds the point that the Legislature could impose a greater liability than mentioned in the Constitution, as was done by Maryland Acts of 1892, Sec. 85L of Chap. 109, making a double liability. This decision covers the case where the liability was to the creditors and upheld the principle applicable under such liability, whereby a plaintiff creditor had to show that he became a creditor while the defendant was a stockholder. But the Court states on pages 517 and 518 that "As the Legislature has changed the liability of stockholders of these companies by the Act of 1904, the decision may no longer be important as a precedent, but the rights of the parties to this suit are to be determined according to 'the existing laws of this state' when that Act was passed". The Act of 1904 referred to by the Court is practically the same as Sec. 72, of Art. 11 of the present Maryland Code. It made the liability an asset of the corporation for the benefit ratably of all creditors and made the liability enforceable by the Receiver. The Act it super-

seded had been worded, and applied by the Courts, similar to the bank liability Act of 1870. The Court stated that its last decision under the old Act of 1892 was no longer a precedent and recognized the changed liability and procedure which was to be applicable to trust companies, but which also had banking powers and were subject to the Constitutional provision.

In COLTON vs. MAYER, 90 MD. 711, (1900) the Court held under the Statute then in effect that the Receiver could not enforce bank stockholders' liability. But the Court might almost be said to have contemplated the time when the statute would be changed, and pointed out that a particular statute only was being construed, by saying, page 714, "Some liability similar to this is generally fixed by statute upon the owners of stock in banking and other corporations that earn their profits out of the money of others, and it is sometimes provided, as in the case of national banks for example, that in the event of failure the receiver can collect what is due on the statutory liability, but in the absence of some law giving him the right to do so, we cannot understand upon what principle he can maintain a suit on a statute such as we have before us," and on page 712, "Inasmuch as this charter does not expressly authorize the receivers to sue, the test of their right to do so is to ascertain whether it gave the corporation any property or estate in this liability of the stockholders, OR IN ANY MANNER MADE IT AN ASSET OF THE BANK...." (Capitals ours).

In MISTER vs. THOMAS, 122 MD. 445 (1914) the Court held on pages 457 and 458 that the liability of stockholders, under Sec. 72 of Art. 11 of the Maryland Code, was to be treated as an asset of the corporation and enforced by the Receivers under the Orders of the Court. This case and LANGE vs. GHINGHER, 168 MD. 353 (1935) and ROBINSON vs. HOSPELHORN, 169 MD. 117 (1935) seem to directly consider and uphold Sec. 72 of Art. 11 of the Maryland Code. The last named case on page 134 refers to MISTER vs. THOMAS SUPRA, as "construing a similar statute."

Under the interpretation given the old statute the liability of the stockholder was to the creditor. In such case there could be set-off by a stockholder of money he had in the bank against his liability. But where the liability was to the creditor there

was a mutuality that can not exist when the liability is to the receiver and is an asset of the corporation. The Court in CAHILL vs. ORIGINAL BIG GUN, ETC. ASSN., 94 MD. 353, repeated that it had been held in Colton vs. Mayer, supra, that the stockholders' liability was directly to the creditors and not to the Receiver for the benefit of creditors, under the statute then existing. The Court then goes on to say that under such condition there can be set-off by a stockholder of money he has in the bank against his liability, but quotes with approval on page 355 from Cooke on Corporations Vol. 1, Sec. 225 (c) to the effect that "Where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholder cannot set off an indebtedness of the corporation to him." The fact that a stockholder cannot claim set-off under the present statute is held by Judge Urner in his Opinion in No. 12,703 Equity of the Circuit Court For Frederick County, Maryland, as to stockholders of the Central Trust Co., as reported in The Daily Record, Baltimore, Md., of February 6, 1934, citing STANDARD PRINTING AND PUBLISHING CO. vs. BOTHWELL, 143 MD. 303, and 40 A. L. R. 1183. This Opinion in the Central Trust Co. case further held that no matter how close to the time of receivership a stockholder had purchased his stock, and no matter what fraudulent representations as to solvency were made in selling the stock,—claiming and exercising the rights of a shareholder and accepting dividends estopped him from denying his stockholders' liability because the rights of third parties intervened at the time of the receivership and it was no longer a matter between the stockholders and the bank.

It is apparent from the Maryland cases that the Court in each case was construing only the statute involved. The Court said in COLTON vs. MAYER, 90 MD. 711, 716, 717, "It was said, in passing on the liability under the statute we have referred to above, in Norris vs. Wrenschall, 34 Md. 492, 'It is a debt under the statute due from the stockholder to the creditor, springing out of and co-existent with the contract between the corporation and the creditor.' And all the cases that have been decided in this State affecting the STATUTORY (Capitals ours) liability of stockholders have been to the same effect". The language of the Court in many of the cases shows that the Court contemplated

that the statute could be changed. Sec. 72 of Art. 11 of he Maryland Code is substantially in the language of the National Banking Act, Sec. 5151 of the Revised Statutes of the United States. The stockholders' liability is made an asset of the corporation and enforceable by a receiver, instead of the liability being to each creditor as he became a creditor, as had been held under the previous statute. When the liability is, as now, to the Receiver there is no question of any creditor being such at the particular time any stockholder owned stock. This seems rather to be the intent of the Constitution when it says that the stockholders shall be made liable for ALL the debts and liabilities of a bank, and the present statute seems to better carry out this intent than the former statute, under which the Courts held the stockholder as not liable for ALL the debts of the bank, but only for the debts contracted while he was a stockholder. The Constitution does not say the liability shall be made to the creditors. The Courts construed the former statute as making the liability to the creditors. Either a liability to the creditors or to the Receiver complies with the Constitution as long as the liability to the extent of the par value of the stock is placed on the stockholders. The Act of 1870 specifically reserved the right to alter or repeal by concluding with the words "and upon this further condition, that this Act and every part of it may be altered from time to time, or repealed, by the Legislature" (Summary, Par. 2). The charter of this bank imposed on those who might become stockholders the obligation that a change in the law might effect by stating in Art. 2 of the Certificate of Incorporation (R. 22) that the corporation is formed "to transact such business as is set out by the terms and conditions in these Articles of Incorporation and in the by-laws of said corporation which may be hereafter adopted, subject to all the conditions in the Public General Laws of Maryland, applicable to a corporation of this charter OR THE AMENDMENTS THERETO WHICH MAY HEREINAFTER BE ENACTED (Capitals ours)."

Sec. 72 of Art. 11 of the Maryland Code placed no heavier liability on a bank stockholder than that of the par value of his shares, the same as the extent of the liability that had been imposed by Sec. 11 of Chap. 206 of the Maryland Acts of 1870. The later Act merely altered and remodeled a remedy, providing

a new and adequate and efficacious remedy in substitution for that which it superseded, which was not a retroactive operation which could be objectionable.

Thistle vs. Frostburg Coal Co., 10 Md. 144
Baugher vs. Nelson, 9 Gill (Md.) 303.
Pittsburgh Steel Co. vs. Balto. Equitable Society, 113 Md. 77
Bernheimer vs. Converse, 206 U. S. 516; 27 S. Ct. 755
Henley vs. Myers, 215 U. S. 373; 30 S. Ct. 148
Pittsburgh Steel Co. vs. Balto. Equitable Society, 226 U. S. 455; 33 S. Ct. 167.

It is apparent that this is entirely different from the situation in HAWTHORNE vs. CALEF, 69 U. S. 10; 2 WALL. 10; LOUISANA vs. PILSBURY, 105 U. S. 278; and COOMBES vs. GETZ, 285 U. S. 434; 52 S. CT. 435. In each of these cases a liability was entirely wiped out and no other remedy provided.

It has been uniformly upheld that a State Legislature may change a statute and provide a new remedy without impairing any obligation of contract, when a new and adequate and efficacious remedy is substituted for that which is superseded. It is so stated in LOUISANA vs. PILSBURY, 105 U. S. 278 at page 301.

In HENLEY vs. MYERS, 215 U. S. 373; 30 S. CT. 148, a Kansas Statute of 1868 and 1889 made stockholders of certain corporations liable for corporation debts to the extent of any unpaid subscription and the par amount of the stock in addition. Enforcement was by individual suits and transfer of stock had to be noted on the books of the corporation to relieve the stockholder of the liability. Act of 1898 made the liability to the creditors and to be considered an asset of the corporation in event of insolvency and to be collected by the Receiver for benefit of all creditors; it further required a transfer of stock to be recorded with the Secretary of State, in addition to being noted on the books of the corporation, to relieve the stockholder of the liability. A stockholder acquired stock in 1887 and sold it in 1899. The transfer was not recorded with the Secretary of State. In a suit by the Receiver the stockholder contended that the requirement of recording the transfer with the Secretary of State, and the statute under which the suit was brought by the Receiver,

impaired the obligation of contract, because that was not the law when he acquired his stock. It was held that there was no impairment of contract and that before the Act of 1898 the stockholder was obliged to see that the transfer of stock was noted on the corporation books and after the Act of 1898 there was the additional duty on the stockholder to see that the transfer was noted on a public record. This Court further said in 30 S. Ct. at page 152, "Equally without merit is the contention that the Statute of 1899 impaired the obligation of the stockholders' contract, in that it substituted for individual actions against them a suit in equity by a receiver appointed after judgment against the corporation. In becoming stockholders, the defendants did not acquire a vested right in any particular mode of procedure adopted for the purpose of enforcing their liability as stockholders. It is a well established doctrine that mere methods of procedure in actions on contract, that do not affect the substantial rights of parties, are always within the control of the State. It is to be assumed that parties make their contracts with reference to the existence of such power in the State."

In BERNHEIMER vs. CONVERSE, 206 U. S. 516; 27 S. CT. 755, the Minnesota Constitution provided, "Each stockholder in any corporation (except those organized for the purpose of carrying on any kind of Manufacturing or Mechanical business) shall be liable to the amount of stock held or owned by him." An Act of 1894 made the creditors the ones to enforce the liability. An Act of 1899 made the liability enforceable by the receiver. It is to be noted that the Minnesota Constitutional provision was self-executing. The stockholder is made liable by the direct language "shall be liable" and the liability was fixed at "amount of stock," no more and no less. The Maryland Constitutional provision is not self-executing; it fixes the minimum liability that must be imposed by the General Assembly, but does not fix the maximum liability that may be imposed. The Minnesota Constitutional provision was much more inflexible, but this Court held that the change in enforcment did not impair the obligation of contract. This Court said in 27 S. Ct., at page 759, "It may be settled that, upon acquiring stock the stockholders incurred an obligation arising from the Constitutional provision, contractual in its nature, and, as such, capable of be-

ing enforced in the Courts not only of that state, but of another state and of the United States (citations), although the obligation is not entirely contractual, and springs primarily from the law creating the obligation". And on page 760, "The liability arising under the Constitution of Minnesota was such that legislation was appropriate to make it effectual. We can find nothing in the fact that one legislature has passed an act which would conclude a subsequent lawmaking body of equal power from passing new and additional measures to make the remedy more effectual. That the first act did not accomplish its purpose is evident. . . . In this condition of affairs the State of Minnesota has undertaken to provide a proceeding for the settlement of insolvent corporations which shall ascertain the assets of the corporation, the amount to which it is necessary, if at all, to call upon the stockholders' liability. It is obviously an act intended to make effectual the liability which is incurred by stockholders under the Constitution of the State, and it ought not to be rendered nugatory unless substantial objection exists against its enforcement."

In PITTSBURGH STEEL CO. vs BALTIMORE EQUITABLE SOCIETY, 226 U. S. 455; 33 S. Ct. 167, this Court practically decided the points raised in the appeal in the present case. In that case a creditor brought suit against a stockholder for his stock subscription which had not been fully paid. The action was begun on February 26, 1908, and at that date it could be maintained. But in April a statute was enacted, Maryland Acts of 1908, Chap. 305, making the stockholder's liability assets of the corporation, saving the rights of creditors at the date of the Act, but providing that the exclusive remedy for such rights, as against Maryland stockholders, should be by bill in equity, on behalf of such creditors as might come in. The Act abated pending actions. The pending action of the creditor was abated and the Maryland Court of Appeals sustained the Constitutionality of the Act in Pittsburgh Steel Co. vs. Baltimore Equitable Society, 113 Md. 77. On appeal to this Court the Maryland Court of Appeals was sustained. This case involved a statute covering liability of stockholders in business corporations, but it is the settled law in Maryland that the character of the liability is the same as the liability under the statutes applicable to banks, as

held in Colton vs. Mayer, 90 Md. 711, 715, and Murphy vs. Wheatley, 102 Md. 501, 519. In the latter case, at page 519, the Court repeats what it said in Colton vs. Mayer, supra, as to statutes covering stockholders' liability in business corporations and in banks, by saying, "but the character of the liability was the same, and the main difference being that under it the stockholders were relieved from their obligations to creditors when all of the capital stock was paid."

Some of the appellant stockholders acquired their stock shortly before Sec. 72 of Art. 11 of the Maryland Code became effective on June 1, 1910. They claim that their liability under the statute in effect when they acquired their stock was to the creditors who became such during their period of stock ownership. The bank was incorporated on January 24, 1910, so these stockholders could not have acquired their stock more than a few months before the effective date of the present statute, which was more than 21 years before the bank ceased doing business. They held their stock during substantially the entire period that the bank operated and obviously held their stock when substantially all debts of the bank were contracted. The deficiency of the bank of "at least $40,000" (R. 21) is far in excess of the entire original capitalization of $20,000 contained in the original charter (R. 23). So that any stockholders who acquired their stock before June 1, 1910, would be liable for an amount of debts vastly in excess of those few shares of stock. There is therefore no possible contention that, if their liability were to be ascertained under the old statute, it could possibly be found that their liability would be less than the full par value of their stock. The present statute simply makes the Receiver the one to enforce the liability instead of individual creditors who became such during the period of stock ownership. It is further true that the original stockholders acquired their stock under a charter making them subject "TO ALL THE CONDITIONS, PROVISIONS, RELATIONS AND POWERS CONTAINED IN THE PUBLIC GENERAL LAWS OF MARYLAND, APPLICABLE TO A CORPORATION OF THIS CHARTER OR THE AMENDMENTS THERETO WHICH MAY HEREINAFTER BE ENACTED" (R. 22). And Maryland Acts of 1870, Sec. 11 of Chap. 206, in effect before June 1, 1910, specifically concluded,

"AND UPON THIS FURTHER CONDITION, THAT THIS ACT AND EVERY PART OF IT MAY BE ALTERED FROM TIME TO TIME, OR REPEALED, BY THE LEGISLATURE."

The present statute imposed no new contract upon existing stockholders, as any liability under this satute was not incurred until insolvency of the bank and appointment of a receiver. The statute applies uniformly to all stockholders of all banks and is certainly not discriminatory, as alleged in the petition of these stockholders (R. 9). After June 1, 1910, any stockholder could have disposed of his stock and would have been subject to no liability whatever by any of the provisions of the present statute. When any of the original stockholders continued to hold their stock and accept dividends thereon, including the last dividend thereon about January 1, 1931, (R. 21), they acquiesced in the provisions of the present statute.

The former practice, prior to the present statute, whereby a stockholder was held to be liable to creditors who became such while he was a stockholder, fastened a liability on a stockholder who had disposed of his stock in good faith long before the insolvency of the corporation. It is submitted that this is entirely inconsistent with the modern attitude towards corporation law. The former practice originated almost a century ago when the modern attitude toward the corporate entity had barely begun to develop. In the modern view, when an individual sells stock owned by him he transfers all rights, benefits and liabilities incident to that stock. He may sell the stock while the corporation is entirely solvent. He may sell his stock because he does not have confidence in new management that has obtained control of the corporation; and later bad management may render insolvent what was formerly a prosperous corporation. Certainly a former stockholder should not be liable for conditions brought about after he has disposed of his stock, when a liquidation of the corporation at the time he disposed of his stock would have shown no liability from him to any creditor. On the other hand, a person buying bank stock, already issued by a bank, from another person may do so with knowledge of the bank's condition and with knowledge of the possibility of being called to pay the assessment thereon, and pay a depreciated price and

be entitled to perhaps enjoy huge gain if affairs work out favorably and, conversely, take the loss if they do not. The design of the present statute was obviously to bring the holders of stock in banks within the modern conception of corporation law and place the stock assessment on those who were stockholders at the time it becomes necessary to enforce the liability. The program of applying this modern view was begun with the Maryland Acts of 1904, Sec. 85L of Chap. 101, applicable to trust companies. The language of this Act was patterned upon the National Banking Act, Sec. 5151 of the Revised Code. It would seem that it can be safely assumed that the Legislature was familiar with the application of the National Banking Act and the procedure thereunder and desired to provide for the same procedure in Maryland. In 1910 the Legislature continued the same pattern in the present statute applicable to banks. Other states have been doing likewise. From HENLEY vs. MYERS, 215 U. S. 373, 30 S. CT. 148, it is apparent that the Kansas Legislature had acted with the same design. From BERNHEIMER vs. CONVERSE, 206 U. S. 516; 27 S. CT. 755, it is apparent that the Minnesota Legislature had acted with the same design.

Insistence by any of the original stockholders that they are liable to creditors under a former statute could only have the effect of making them liable to the creditors in one capacity and to the Receiver in another capacity, because the obligation of the present statute can not be evaded even if there were other and additional liability. The Legislature could place a liability on stockholders greater than the amount of their respective shares, mentioned in the Constitutional provision, as was held in Murphy vs. Wheatley, 102 Md. 501, so that this liability created by the present statute would not be concelled even if it were contended that a separate liability to the individual creditors exists in some way under the Constitutional provision and previously enacted statutes.

Those stockholders who acquired their stock after the present liability statute became effective on June 1, 1910, assumed their liability under the present statute when they became stockholders.

The stockholders' petition (R. 7, 8) alleges that the assessment Order of June 19, 1933, was a surprise and passed ex parte. SEC. 9, OF ART. 11 OF THE MARYLAND CODE provides for the Bank Commissioner taking charge of a bank and causing notice by advertisement in the newspapers and posting notice on the front door of the bank. When a bank is taken over by the Bank Commissioner and such notices given, the stockholders surely are put on notice that the bank is insolvent and an Order calling upon them for their stock liability should not be a surprise. But it has been held that no notice to stockholders is necessary before such an Order. In GLENN vs. WILLIAMS, 60 MD. 93, the Court held, at page 115, that stockholders could not complain because they, in their individual capacities, were not parties to the proceeding, and had no opportunity to defend against establishment by decree of the large amount of debts against the corporation. The Court said "When the Court obtained jurisdiction of the corporation, every stockholder, in his corporate capacity, was a party to the cause . . . ." On page 117 the Court said "the question of the right and power of a court of equity to order or decree assessments or calls upon the unpaid subscriptions to stock, for the purpose of paying the corporate debts, without having the individual stockholders before it as parties to the proceeding, has been settled in the most authorative way," and proceeds to cite reasons and authorities including on page 118 the citation of SANGER vs. UPTON, 91 U. S., 56, holding that in contemplation of law the stockholders were before the Court in all the proceedings touching the corporation of which they were members, not in pursuance of any express provision of the bankrupt law, but in analogy to the powers and procedure of a Court of Equity, and to meet the requirements and justice of the case. It was similarly held in BERNHEIMER vs. CONVERSE, 206 U. S. 516; 27 C. CT. 755, at page 760.

The intention of the Legislature in regard to bank stockholders' liability is further shown by the language contained in the "Emergency Banking Act". At the time of the banking stress this Act was passed to provide a banking "holiday". It placed all Maryland banks in the hands of the Bank Commissioner and provided that he could permit any banking insti-

tution to exempt itself from such custody under certain proper conditions. SEC. 71M, CHAP. 46, OF THE MARYLAND ACTS OF 1933, (Summary, Par. 4) which was a part of the "Emergency Banking Act" particularly stated that "any person who may be a stockholder at the commencement of such period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the receiver for the statutory assessment on said shares". If the Legislature had intended that Sec. 72 of Art. 11 of the Maryland Code should fix a liability on stockholders to creditors at the time the debts were contracted, and apply to previous stockholders who had sold their stock, the language of the "Emergency Banking Act" would have embraced such previous stockholders, instead of only those who were stockhelders at the commencement of the period of custody.

It is submitted that all of the aforegoing shows that the Maryland Constitutional provision does not make mandatory any particular form or manner of liability to be imposed on bank stockholders, except that they shall in some manner, in the free judgment of the Legislature, be made liable to the amount of their shares. No Maryland case has ever placed any interpretation upon the Constitutional provision. The Maryland Court of Appeals in this case has not over-ruled any previous Maryland cases. Previous Maryland cases construed only the statute with which they were dealing at that particular time. The Maryland Court of Appeals in this case construed the present liability statute. The present statute was intended to supply a more satisfactory remedy than the former statute. In PITTSBURGH STEEL CO. vs. BALTIMORE EQUITABLE SOCIETY, 113 Md. 77, at page 82, the Court said "If the change in the form of remedy thus made by the Act deprived the creditor of any existing remedy it certainly furnished him with an alternative one equally adequate and efficacious. The separate right of action at law existing in the creditor against the stockholder before the passage of the Act, although having the appearance of a reliable and efficient remedy, has been found upon close scrutiny to have been, in practice, a precarious and uncer-

tain one. The remedy supplied by the Act is a more adequate and efficacious one."

In any event, the Supreme Court of the United States has complete freedom in deciding this appeal. In COOMBES vs. GETZ, 285 U. S. 434; 52 S. CT. 435, at page 436, it was said, "The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this Court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this Court will give careful and respecful consideration and all due weight to the adjudication of the State Court, but will determine independently threof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected", and proceeds to cite numerous authorities. In dealing with a similar change previously made, this Court said in PITTSBURGH STEEL CO. vs. BALTIMORE EQUITABLE SOCIETY, 226 U.S. 455; 33 S. CT. 167, at page 168, "The plaintiff's supposed contract was subject to peculiar infirmities. His right was shared equally by all other creditors of the corporation, and not only might some other creditor by diligence have got in ahead of the plaintiff and have exhausted the fund for which the defendant could be held, but the right depended on the stockholder's will. . . . He could have paid the corporation or a receiver or other creditors. The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by consideration of fact,—of what the remedy amounted to in practice. . . . The Court of Appeals states that the remedy has been found in practice an uncertain one, less efficacious than that which is substituted. There is nothing to contradict their statement as to what experience has taught". And so, consideration of fact enteres into this case. Set-off has been denied stockholders in the Central Trust Co. in No. 12,703 Equity in the Circuit Court For Frederick County, Maryland. Other banks in Maryland, with vast sums of money involved, are in process of liquidation, as is apparent from

Lange vs. Ghingher, 168 Md. 353, and Robinson vs. Hospelhorn, 169 Md. 117. The hopeless intricacy of endeavoring to ascertain the rapidly shifting balances and deposits from day to day in these banks over a period of years would practically result in confusion, and result in no actual liability being enforced against the stockholders, if the present liability were to be construed in any other manner than that under the decision of the Maryland Court of Appeals in this case. By any other interpretation the effect of the liability fully intended by the Maryland Constitution to be imposed by the Legislature upon bank stockholders would not be promoted, but would really be nullified by being rendered ineffectual.

It is, therefore, respectfully submitted that the rulings and decree appealed from should be sustained.

In the absence of counsel the Appellee is willing to submit his cause on brief.

Respectfully submitted.

ELIAS B. HARTLE,

WILLIAM H. BOVEY,

Counsel for Appellee in No. 298.

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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## No. 299

---

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

*Appellants,*

*vs.*

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, ETC.

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

---

## BRIEF OF APPELLEE.

---

ROBERT H. MCCAULEY,
J. LLOYD HARSHMAN,
*Counsel for Appellee.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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# No. 299

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STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

*Appellants,*

*vs.*

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, ETC.

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

---

## BRIEF OF APPELLEE.

---

### Statement of Facts.

The statement of facts contained in the brief of the appellants, pages 4-6, fairly presents an outline of the facts involved in this appeal, except as to the respective dates upon which the appellants acquired their stock.

The apellants in this case are F. Sydney Cushwa, Susan F. Cushwa, Nora Miller Baker, C. Walter Baker, Gladys K. Bostetter, Crystal Bostetter Hershey, Ardella M. Newcomer, Julia Hamilton Briscoe and Julia Hamilton Briscoe, Trustee.

These appellants first acquired stock in the corporation, now known as Hagerstown Bank and Trust Company, as follows:

| | No. of Shares. | Date Acquired. |
|---|---|---|
| Sydney F. Cushwa | 20 | Jan. 3, 1929 |
| Susan F. Cushwa | 75 | March 13, 1929 |
| Nora Miller Baker | 100½ | Jan. 18, 1929 |
| C. Walter Baker | 19½ | Jan. 18, 1929 |
| Gladys K. Bostetter | 27 | Jan. 18, 1929 |
| Crystal Bostetter Hershey | 28½ | Jan. 18, 1929 |
| | ½ | Feb. 4, 1929 |
| Ardella M. Newcomer | 100 | March , 1913 |
| | 33 | Dec. 1, 1919 |
| | 33 | Aug. 29, 1922 |
| Julia Hamilton Briscoe | 79½ | Dec. 20, 1928 |
| Julia Hamilton Briscoe, Trustee | 2452½ | Dec. 20, 1928 |

(R. 24.)

The earliest date on which any of the appellants acquired stock is March, 1913.

The statute in question, ch. 219 of the Acts of the General Assembly of Maryland of 1910, codified as Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland became effective on June 1, 1910.

None of the appellants were stockholders and there is nothing in the record to show that any of them were depositors or creditors until long after the statute complained of was enacted and became effective as part of the statutory laws of Maryland.

## Reference to Official Opinion.

The decision from which this appeal is taken is officially reported in the case of *Ghingher* v. *Kausler*, 169 Md. 696 (*Hagerstown Bank and Trust Company* case), on the authority of *Ghingher* v. *Bachtell*, 169 Md. 678 (*Peoples Banking Company of Smithsburg, Md.*, case), for reasons set forth therein.

Attention is here called to an error in the printing of the official report in the case of *Ghingher* v. *Bachtell*, 169 Md. 678, occurring in the first sentence of the first paragraph on page 690. Through an error, the words "minimum" and "maximum" were transposed in the printing of the official report. The opinion is correctly set forth in the printed record in the *Peoples Banking Company of Smithsburg, Md.*, case in No. 298, October Term, 1936, of Supreme Court of the United States near the bottom of page 52 and is also correctly reported in 182 Atlantic Reporter, page 563.

A certificate for the purpose of pointing out this error was filed with the Clerk of the Supreme Court of the United States on November 14, 1936, executed by Herbert T. Tiffany, State Reporter of the Court of Appeals of Maryland, James A. Young, Clerk of the Court of Appeals of Maryland, and Carrol T. Bond, Chief Judge of the Court of Appeals of Maryland.

## Summary of Argument.

I. THE APPELLANTS SEEK BY THIS APPEAL TO REVIEW THE CONSTRUCTION PLACED BY THE COURT OF APPEALS OF MARYLAND ON THE MARYLAND CONSTITUTION AND STATUTES RELATING TO LIABILITY OF STOCKHOLDERS OF BANKS AND TRUST COMPANIES, BUT FOR REASONS HEREAFTER ASSIGNED, THE DECISION OF THE APPELLATE COURT IN MARYLAND IS NOT THE PROPER SUBJECT OF REVIEW IN THIS CASE.

II. UNDER THE ADMITTED FACTS NO CONSTITUTIONAL QUESTION AS TO IMPAIRMENT OF CONTRACT IS PRESENTED ON BEHALF OF THE APPELLANTS.

A. The present corporation was not organized until June 1, 1908, when it began business as a bank and trust company.

B. When the first stock was issued and the first deposits made or debts incurred the statute law of Maryland since 1904 relating to corporations doing a trust business imposed upon its stockholders the identical obligations and gave to its creditors identical rights as the statute complained of.

C. Where banks in Maryland possessed both banking and trust powers, the Courts of Maryland uniformly applied the statutory liability applicable to trust companies.

D. None of the appellants in this case were either stockholders or creditors prior to the enactment of the statute complained of in 1910.

III. UNDER THE LAW THE APPELLANTS HAVE NO VESTED CONTRACTUAL RIGHTS AS STOCKHOLDERS WHICH WERE IMPAIRED BY THE STATUTE IN QUESTION.

A. None of the appellants acquired any stock in this corporation until long after the statute in question was enacted into law.

B. The charter of the corporation subjected its stockholders to such changes in statutory liability as might be made from time to time by the Laws of Maryland.

C. The provisions of Acts of 1870, ch. 206, Sec. 11 relating to banks by express terms provided for alteration of stockholders liability from time to time.

D. All charters of corporations in Maryland granted since Maryland Constitution of 1851 are subject to repeal and alteration.

E. Stockholders have no vested right to be proceeded against in any particular method or procedure.

F. By amendment to charter of corporation effecting reorganization in December, 1928, all stockholders became subject to 1910 liability statute.

IV. UNDER THE LAW THE APPELLANTS HAVE NO VESTED CONTRACTUAL RIGHTS AS CREDITORS WHICH WERE IMPAIRED BY THE STATUTE IN QUESTION.

A. So far as the record discloses none of the appellants became depositors or creditors of the corporation prior to the date the statute complained of took effect.

B. The legislation complained of was remedial in character and preserved all substantial rights of creditors.

C. The so-called incidents of contract set up by the appellants were merely matters of procedure under former fiction of contract prior to Maryland Statutes of 1904, 1908 and 1910.

D. The former remedy of creditors was inadequate and precarious.

E. No creditor has the right to complain of a change in the statute law modifying or taking away a right or remedy provided he be given in substitution therefor a right or remedy substantially equivalent thereto.

F. The remedy furnished to creditors under the present statute is more simple, direct and effective than under the preexisting law.

All statutes cited in this brief are Acts of the General Assembly of Maryland unless otherwise specifically designated.

## ARGUMENT.

### I.

**The appellants seek by this appeal to review the construction by the Court of Appeals of Maryland of the Maryland Constitution provision relating to the liability of stockholders of banks and also the Maryland Statutes relating to the same.**

CONSTRUCTION OF CONSTITUTION.

The provision in Section 39 of Article 3 of the Constitution of Maryland of 1867 reads as follows:

> "The General Assembly shall grant no charter for banking purposes nor renew any banking corporation now in existence, except upon the condition that the stockholders shall be liable to the amount of their respective share or shares of stock in such banking institution for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all banks shall be open to inspection under such regulations as may be prescribed by law."

Substantially the same provision was contained in the Maryland Constitutions of 1851 and 1864.

In the early cases decided in Maryland relating to the enforcement of the statutory liability of stockholders in manufacturing corporations and in banking corporations the Maryland Court of Appeals at no time and in no decision undertook to construe the meaning and effect of the constitutional provision. A careful reading of the opinion in each of these cases will show that the Court expressly limited its decision and interpretation to particular charters and statutes.

A brief summary of the decisions in Maryland and Maryland statutes will be found in France's Principles of Corporation Law, Section 122-124, page 235.

The first interpretation and construction of this constitutional provision appears in the language of the Court of Appeals of Maryland as follows:

> "We have before us not a simple Act of the Legislature, and as such, open to construction under the rules of statutory interpretation, but, in reality a basic provision of the State Constitution, as amplified in administrative detail by a subsequent act of the law making body of this State. The question, then, being one of constitutional and not statutory construction, and finding no case in which this section has been previously expounded, it is presented as one of first impression. Viewed in that aspect, the controlling force in its adjudication must be developed from an inquiry into the underlying purpose sought to be accomplished by its terms."
>
> "It will be observed, however, that the Constitution does not fix the maximum liability to which stockholders in a banking institution, organized under the authority thereof, may be subjected; it does, though, fix the minimum liability of such stockholder, which, under its mandate, shall be 'to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise.' Nor does it limit the liability of stockholders to such debts as may have been incurred by the bank during the respective period of stock ownership. It creates a liability, as an incident to stock ownership in a banking corporation, for all its debts; and it is nowhere apparent that it was the intention of the framers of the Constitution to place upon creditors of an insolvent bank, or upon a receiver of its affairs, the insurmountable burden of proving, from day to day, and perhaps over a long period of years, the exact financial status of a banking corporation as a condition precedent to the recovery of liability."
>
> *Ghingher* v. *Bachtell*, 169 Md. 678, 688, 690.

The constitutional provision prescribes no rule for the practical working out of its simple mandate; and by its

very silence leaves the question in Legislative control. It is true that early decisions of the Court of Appeals of Maryland construed language similar to that used in the Constitution as authorizing the remedial procedure formerly prevailing in Maryland, but no decision suggests that the creditors remedy thus supplied by the Court was the exclusive way of complying with the Constitution.

The constitutional provision does not of itself attempt to define the nature of the liability and does not provide any method for its enforcement. These matters were left to the Legislature of the State.

The courts of Maryland have construed this provision as establishing merely the minimum liability to be imposed upon stockholders of banks for the benefit of creditors.

*Murphy* v. *Wheatley*, 102 Md. 501, 514.

The Circuit Court for Washington County in originally passing upon the instant case stated "there is no prohibition in the Constitution against giving creditors of banks rights or imposing upon stockholders obligations greater than required by the Constitution". (R. 40.) The same view is expressed in the opinion of the Court of Appeals of Maryland in the instant case as quoted above.

The appellee contends that the statute under attack in this case imposes liability in strict accordance with the provisions of the Maryland Constitution to the effect that stockholders should be held liable at least to an amount equal to the par value of their shares for the debts and engagements of the bank. A reasonable and fair interpretation of the word "stockholders" as used in the constitutional provision and as used in the present statute points conclusively to those who were stockholders at the time the necessity for the enforcement of statutory liability arose to meet the debts and engagements of the bank.

CONSTRUCTION OF THE STATUTES.

The so called incidents of the contractual relation between stockholders and creditors of the bank under the older decisions in Maryland were not intended to define the nature of the liability of stockholders to creditors but arose only incidentally as the logical consequence of the Court attempting to furnish a procedure for the enforcement of liability. The change in the theory of recovery against stockholders giving the first legislative method of enforcement was made by Chapter 101 of the Acts of 1904, continued in Chapter 153 of the Acts of 1908 and copied in Chapter 219 of the Acts of 1910 which is the subject of the present litigation.

The Maryland authorities prior to the Act of 1904, Chapter 101, were decided upon the theory that there was no existing statute in Maryland prescribing the remedy or procedure for enforcing stockholders' liability.

In *Colton* v. *Mayer*, 90 Md. 711, at page 714 the Court says:

> "Some liability similar to this is generally fixed by statute upon the owner of stock in banking and other corporations that earn their profits out of the money of others; and it is sometimes provided, as in case of National banks for example, that in the event of failure the receiver can collect what is due on the statutory liability, but in the absence of some law giving him the right to do so, we cannot understand upon what principle he can maintain a suit on a statute such as we have before us."

The fair interpretation of these statutes from 1904 to 1910 inclusive is that they are purely remedial in character, that they are in strict accordance with the Constitution of Maryland, that they apply for the benefit of those creditors who were such at the time when the necessity of invoking the liability of stockholders arose and to those

stockholders who were such at the time it became necessary to call upon them to make their contribution toward the payment of the debts of the corporation.

*Lange* v. *Ghingher,* 168 Md. 353;
*Robinson* v. *Hospelhorn,* 169 Md. 117;
*Ghingher* v. *Bachtell,* 169 Md. 678.

A similar statute was construed by the Supreme Court of Michigan in 1899 for the purpose of determining what stockholders were meant and the same conclusion was reached upon the same reasoning used by the Maryland Court of Appeals in the instant case.

*Foster* v. *Broas,* 120 Mich. 1, 79 N. W. 696, 700.

This conclusion is further indicated by the interpretation placed upon the statute in question by the General Assembly of Maryland by the enactment of emergency banking legislation, by section 71M, of chapter 46 of the Acts of 1933 which says:

> "Nothing contained in this Act shall be construed to relieve any stockholder of record in any banking institution at the time of the passage of this Act from the liability imposed by Section 72 of this Article. Any person who may be a stockholder at the commencement of said period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the Receiver for the statutory assessment on said shares * * *."

Until the present litigation, there has been no decision of the Court of Appeals of Maryland construing the Statutes of 1904, 1908 and 1910 because until the instant case, the change in the procedure for the enforcement of stockholders liability was generally assumed by the Courts, lawyers and laymen in Maryland to apply only to stock-

holders of record at the time of the closing of a bank, and to be enforceable by a receiver for the benefit of creditors as in the case of National Banks.

In the earlier cases in Maryland the Court was construing statutes which were entirely different from the one we have now. Those decisions are, therefore, of no force as precedents in the instant case.

In the *Murphy* v. *Wheatley* case, 102 Md., *supra*, the Court says, bottom page 517:

> "But under the rule adopted by this Court, they can if they choose, ascertain who the stockholders are when the debts are contracted. As the late Legislature has changed the liability of stockholders of these companies by Act of 1904, the decision of the question may no longer be important as a precedent, but the rights of the parties to this suit are to be determined according to the existing laws of this State when that Act was passed."

To the same effect is *Coulbourn* v. *Boulton*, 100 Md. 350. The Court, on page 354, says:

> "It has been decided by this Court in the case of Murphy *vs.* Wheatley, *supra*, that the stockholders, of the corporation mentioned, and in which the Appellants are alleged to hold stock, are subject to the liability provided for in said Section 85L by virtue of its operative effect as a part of the general law relating to corporations. Before taking up the questions presented by the record it may be remarked that it will be seen from the dates given that the case is to be disposed of without reference to the Acts of 1904, Chapter 101 and Chapter 337."

The Court of Appeals in that case, as in the *Murphy* v. *Wheatley* case, *supra*, both of which cases related to the liability of stockholders of The City Trust and Banking Company of Baltimore City, was very careful to call atten-

tion to the fact that in deciding the case it was governed by the old Act of 1892 and was not governed by the Act of 1904, Chapter 101. The Court did not want its opinion in that case, as it did not want the opinion in the *Murphy* v. *Wheatley* case, to be considered in any manner as a precedent under the Act of 1904. The Act of 1904, Chapter 101, is substantially the same as the Act of 1908, Chapter 153 and as the Act of 1910, Chapter 219. The only change the Act of 1908 made in the Act of 1904 was to omit from the extra liability provision guaranty and fidelity companies, and the only change that the Act of 1910 made was to transfer trust companies from Article 23 (Corporations) and to include it with State banks in Section 72 of Article 11 (Banks) of the Annotated Code of Maryland.

It is respectfully submitted, however, for the reasons hereinafter set forth that no question of impairment of contract under the contract clause of the Federal Constitution is involved in this case and that the decision of the Court of Appeals of Maryland in the interpretation of the Maryland Constitution and the statutory liability statute in question is not open to review in this case.

II.

**Under the admitted facts in this case no constitutional question as to impairment of contract is presented on behalf of either stockholders or creditors of the Hagerstown Bank and Trust Company.**

A. THE CORPORATION WAS NOT ORGANIZED UNTIL JUNE 1, 1908, WHEN IT BEGAN BUSINESS AS A BANK AND TRUST COMPANY.

The present Hagerstown Bank and Trust Company was originally incorporated as a surety and guaranty company under the name of The Maryland Surety and Guaranty

Company by Chapter 298, Acts of the General Assembly of Maryland of 1902, page 416.

In 1904 there were several amendments to its charter, which for the purposes of this case, are inconsequential made by the Acts of 1904, Chapter 215, page 351, effective April 1, 1904. By Chapter 410 of the Acts of the General Assembly of Maryland of 1908, page 1285, its charter was further amended, changing its name to Maryland Surety and Trust Company, and granting the authority by Section 6 thereof to act as trustee and engage in a general trust business by which section it is also provided that "the liabilities of the stockholders shall at all times be determined by the laws of the State in force at the time the said liabilities may attach."

There was no further amendment to the charter until 1928, when, under the general provisions of the banking laws, there were certain amendments changing its name to The Hagerstown Bank and Trust Company, increasing the number of Directors, and increasing the capital stock from $250,000.00 to $550,000.00. See certified copy of amendment, Record page 27.

Although the corporation was originally incorporated in 1902, no stock was ever issued by it until June 1, 1908, and it did not open for the transaction of business until that date when it organized under the name of Maryland Surety and Trust Company as a trust company doing also a banking business. (Record page 23 and Appellant's Brief page 4.)

B. BEFORE THE CORPORATION ISSUED ANY STOCK AND OPENED ITS DOORS FOR THE TRANSACTION OF BUSINESS ON JUNE 1, 1908, THE GENERAL ASSEMBLY OF MARYLAND PASSED CHAPTER 153, ACTS 1908, PAGE 60, WHICH BECAME EFFECTIVE ON MARCH 30 OF THAT YEAR REPEALING AND REENACTING CHAPTER 101 OF THE

ACTS OF 1904 OF THE GENERAL ASSEMBLY OF MARYLAND, GOVERNING LIABILITY OF STOCKHOLDERS OF TRUST COMPANIES AS FOLLOWS:

85L. "The stockholders of every such safe deposit, trust and loan company or association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stocks. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee shall not be personally subject to any liability on such stockholders, but the person pledging the stock and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares. And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of such corporation, if necessary, to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction; provided that this Act shall not affect the rights or remedies of any creditor or depositor under the existing laws of this State against the stockholders of any such corporation, who were liable to any such creditor or depositor at the date of the passage of this Act; and provided further, that nothing in this Act shall be considered as a construction by the Legislature of the law hereby repealed."

This statute was codified as Section 116 of Article 23 entitled "Corporation" of the Annotated Code of Public General Laws of Maryland of 1910.

The above Act, which became effective on March 30, 1908, was, therefore, the law of the State of Maryland on June 1,

1908, when the first stock of the corporation was issued and when it began business as a bank and trust company. The liability imposed on stockholders by the Section just quoted is the same in every particular as Chapter 219 of the Acts of the General Assembly of Maryland of 1910 which is codified as Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland under which enforcement of the stockholders' liability in the instant case is sought. The only change in Chapter 219 of the Acts of 1910 was to transfer trust companies from Article 23 and to include them with State banks. Further, the Act of 1908, hereinbefore set forth, is in susbtance a reproduction of the Act of 1904, Chapter 101, page 179, which Act became effective on March 18 of that year. Therefore, the statute which is being invoked in this case was the law of Maryland since March 18, 1904, or more than four years before the present corporation issued any stock or opened its doors for the transaction of business.

All stock of The Hagerstown Bank and Trust Company, which operated as a trust company from the date of its organization in 1908 until its suspension, was acquired and all debts and deposits were made during the time these provisions as to stockholders' liability of trust companies remained unchanged upon the statute books of Maryland.

C. WHERE CORPORATIONS IN MARYLAND POSSESSED BOTH BANKING POWERS AND TRUST POWERS, THE COURTS OF MARYLAND HAVE UNIFORMLY APPLIED THE STATUTORY LIABILITY APPLICABLE TO TRUST COMPANIES SO LONG AS THERE WERE STATUTES IN EFFECT IMPOSING DIFFERENT LIABILITIES ON BANKS AND TRUST COMPANIES RESPECTIVELY.

At the time of the organization of this corporation on June 1, 1908, when the first stock was issued and the first debts incurred there were in Maryland two different stat-

utes relating to statutory liability of stockholders in such corporations:

(a) There was included in the provision of the General Laws of the State of Maryland in Article 11 entitled "Banks" Section 27 of the Code of Public General Laws of Maryland of 1888, the codification of Section 11 of Chapter 206 of the Acts of 1870 as follows:

> "The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this Article and every part of it may be altered from time to time, or repealed by the Legislature."

(b) There was also in effect at that time Chapter 153 of the Acts of the General Assembly of Maryland of 1908 applicable to safe deposit, trust, and loan companies hereinabove set forth in full. In event the corporation then known as the Maryland Surety and Trust Company had become insolvent in 1909 the stockholders of said corporation would have been subjected to liability under the provision of Chapter 153 of the Acts of 1908.

This same situation arose in two different instances in Maryland.

It first arose in the cases of *Coulbourn* v. *Boulton*, 100 Md. 350, and *Murphy* v. *Wheatley*, 102 Md. 501 in respect to the liability of stockholders of the City Trust and Banking Company of Baltimore City which ceased to do business on June 6, 1903, when receivers were appointed. At the time of its failure there were likewise two statutes in

effect relating to statutory liability of its stockholders as follows:

(1) Chapter 206 of the Acts of 1870 relating to "Banks" as above set forth;

(2) Chapter 109 of the Acts of 1892 relating to safe deposit, trust, guaranty, loan and fidelity companies which Act provided:

> "Each stockholder shall be liable to the depositors and creditors of any such corporation for double the amount of stock at the par value held by such stockholder in such corporation."

The City Trust and Banking Company of Baltimore City operated both a banking and trust business as in the case of the Hagerstown Bank and Trust Company. The Court of Appeals of Maryland determined as a matter of law that its stockholders were subject to the provisions of the Acts of 1892 which imposed a statutory liability on stockholders of trust companies equal to twice the amount of the par value of the stock, commonly known as a triple liability.

The same situation arose again in the case of *Mister* v. *Thomas*, 122 Md. 445, in respect to the liability of stockholders of The Farmers Trust Banking and Deposit Company which ceased to do business on October 9, 1907, when receivers were appointed. At the time of its failure there were likewise two statutes in effect relating to statutory liability of its stockholders as follows:

(1) Chapter 206 of the Acts of 1870 relating to "Banks" as above set forth;

(2) Chapter 101 of the Acts of 1904 which was subsequently repealed and re-enacted by Chapter 153 of the Acts of 1908 quoted above, the only modification in the Acts of

1908 being to omit stockholders of guaranty and fidelity companies from the statutory liability.

The Farmers Trust Banking and Deposit Company operated both a banking and trust business as in the case of the Hagerstown Bank and Trust Company. The Court of Appeals of Maryland determined as a matter of law that its stockholders were subject to liability enforceable by its receiver under the provisions of Chapter 101 of the Acts of 1904 which imposed a liability identical in terms to the statute complained of in this case.

It is apparent therefore that even had the Hagerstown Bank and Trust Company failed before the passage of Chapter 219 of the Acts of 1910, complained of in this case, the same liability would have been imposed upon its stockholders for the benefit of its creditors as the liability which the receiver of the Hagerstown Bank and Trust Company is now undertaking to enforce.

Inasmuch as all stock in the corporation, known at the date of its organization as the Maryland Surety and Trust Company and now designated by appropriate amendments to its charter in 1928 as Hagerstown Bank and Trust Company, was issued subsequent to the passage of Section 153 of the Acts of 1908 imposing the identical liability complained of in this case and in the same language, we respectfully submit that its stockholders can not now come into Court and assert any violation of their vested rights or complain that any obligation of contract between them and the corporation or between them and the creditors of the corporation has been impaired.

D. NONE OF THE APPELLANTS IN THIS CASE WERE STOCKHOLDERS NOR DOES THE RECORD SHOW THAT ANY OF THEM WERE CREDITORS PRIOR TO THE ENACTMENT OF THE STATUTE COMPLAINED OF IN 1910.

As pointed out in the statement of facts, the earliest date that any of the appellants herein acquired any stock

in the corporation now known as the Hagerstown Bank and Trust Company was March, 1913, or almost three years after the statute complained of went into effect. And so far as the record discloses none of them were depositors or creditors prior to the respective dates they acquired their stock. With one single exception all of them acquired stock in the corporation after the charter of the corporation was amended on December 4, 1928, and its capital increased from $250,000.00 to $550,000.00 (R. 24, 27).

III.

**The appellants have no vested contractual rights as stockholders under the law which were impaired by the statute in question.**

A. NONE OF THE APPELLANTS ACQUIRED STOCK IN THIS CORPORATION PRIOR TO MARCH, 1913, OR APPROXIMATELY THREE YEARS AFTER CHAPTER 219 OF THE ACTS OF 1910 BECAME A LAW (R. 24).

Although two stockholders, to-wit, Annie E. Miller and John E. Stonebraker, Admr., who filed answers to the Receiver's petition in the Circuit Court below acquired stock prior to June 1, 1910, these stockholders did not participate in this appeal and their rights are not before this Court for adjudication.

There was only $150,000.00 authorized capital of the corporation issuable as of June 1, 1908 (Section 2, Corporate Charter, R. 28), and it does not appear that any of the stock held by the appellants was originally issued prior to the enactment of the statute complained of.

Stockholders of a corporation by the acquisition of stock became bound by the statute law of the State which was read into and became a part of the charter.

*Kingston* v. *Old National Bank of Centralia*, 359 Ill. 192, 194 N. E. 213.

B. By the express language of the charter of the corporation, its stockholders agreed to be bound from time to time by the laws of the State of Maryland in effect at the time the statutory liability should attach. Chapter 410 of Acts of General Assembly of Maryland of 1908.

C. The Acts of 1870 Chapter 206, Section 11, relating to "Banks" contained the express condition that the law as to stockholders' liability might be altered from time to time by the Maryland legislature.

D. The charters of all corporations in Maryland granted since the Maryland constitution of 1851 are subject to repeal and alteration.

*Washington County Hospital* v. *Mealey*, 121 Md. 274, 282.

Where the power to alter or amend a charter of a banking corporation is reserved to the Legislature, it may change the law in regard to the liability of stockholders without violating the Federal Constitution forbidding impairment of contracts. The Constitutional provision that "the Legislature shall grant no charter for banking purposes except upon condition that the stockholders shall be liable for the debts of the bank to the extent of their stock" does not preclude the Legislature from imposing a greater liability.

*Pate* v. *Bank of Newton*, 116 Miss. 666, 77 So. 601;
*Parker* v. *Carolina Savings Bank*, 53 S. C. 583, 31 S. E. 673;
*Sherman* v. *Smith*, 1 Black 587;
*Duke* v. *Force*, 120 Wash. 599, 208 Pac. 67;
*Davis* v. *Moore*, 130 Ark. 128, 197 S. W. 295;
3 Ruling Case Law, Section 26, p. 397.

E. STOCKHOLDERS HAVE NO VESTED RIGHT TO BE PROCEEDED AGAINST IN ANY PARTICULAR METHOD OR PROCEDURE TO ENFORCE THEIR STATUTORY LIABILITY.

*Coffin Bros.* v. *Bennett*, 277 U. S. 29, 48 S. Ct. 422;
*Henley* v. *Myers*, 215 U. S. 373, 30 S. Ct. 148;
*Bernheimer* v. *Converse*, 206 U. S. 576, 27 S. Ct. 755;
*Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 7 S. Ct. 757;
*Converse* v. *Ayre*, 197 Mass. 443, 84 N. E. 98;
*Harris* v. *Taylor*, 148 Ga. 663, 98 S. E. 86;
*Springhorn* v. *Dirks*, 72 Mont. 121, 231 Pac. 912;
*Cosmopolitan Trust Co.* v. *Cohen*, 244 Mass. 128, 138 N. E. 711;
*Allen* v. *Prudential Trust Co.*, 242 Mass. 78, 136 N. E. 410.

F. BY AMENDMENT TO CHARTER OF CORPORATION EFFECTING REORGANIZATION IN DECEMBER, 1928, ALL STOCKHOLDERS BECAME SUBJECT TO 1910 LIABILITY STATUTE.

The charter of the corporation which until 1928 was known as the Maryland Surety and Trust Company was amended by Articles of Amendment dated December 4, 1928, and duly recorded in Liber 3, folio 379 of the Corporation Records of Washington County, Maryland (R. 27). By this Amendment the name of the corporation was changed from the Maryland Surety and Trust Company to Hagerstown Bank and Trust Company, the capital stock was increased from $250,000.00 to $550,000.00, the Board of Directors was increased and various other changes made in consequence of a reorganization by which the Hagerstown Bank and the Maryland Surety and Trust Company were consolidated. By this amendment of its charter the stockholders of the corporation subjected themselves to all the

provisions of Chapter 219 of the Acts of the General Assembly of Maryland of 1910 then in effect relating to the liability of stockholders of banks and trust companies.

Where a corporation subsequent to the passage of the statute imposing double liability in the State of Kentucky amended its charter with the consent of two-thirds of its stockholders by changing its corporate name and making other material alterations in its government, it was held by the Court that by so amending its charter the corporation became subject to the provisions of the statute passed subsequent to its incorporation and that therefore its stockholders were liable under the statute.

*Senn* v. *Levy*, 111 Ky. 318, 63 S. W. 776.

An acceptance of the altered charter was clearly made by continuation in business after the change was made. The statute in question is not void as infringing either upon the Constitution of the State or of the United States.

*Blytheville* v. *State*, 148 Ark. 504, 230 S. W. 550.

IV.

**The appellants have no vested contractual rights as creditors under the law which were impaired by the statute in question.**

A. As stated above there is nothing in the record to show that any one of the appellants were depositors or creditors of the corporation prior to June 1, 1910, when Section 68 of Chapter 219 of the Acts of the General Assembly of Maryland of 1910, codified as Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland (1924 edition) became effective.

B. The creditors of the Hagerstown Bank and Trust Company are being deprived of no substantial rights.

The Maryland statutes of 1904 Chapter 101, 1908 Chapter 153, and 1910 Chapter 219, relating to trust companies

and to banks were remedial in their nature. The substance of the obligation of the stockholder to the creditor was in the event of insolvency to pay a sum equal to the par value of his stock for the benefit of creditors.

C. THE SO CALLED INCIDENTS OF CONTRACT BETWEEN STOCKHOLDERS AND DEPOSITORS SET UP IN THE BRIEF OF THE APPELLANTS MERELY AROSE IN CONNECTION WITH THE PROCEDURE FURNISHED BY THE COURTS FOR THE ENFORCEMENT OF LIABILITY BEFORE ANY ACTUAL REMEDY WAS GIVEN BY STATUTE.

The Maryland courts treated the obligation as based on the fiction of a contract and applied the ordinary rules of pleading and procedure on that theory. There being no statute making the liability collectible by a receiver, courts in order to save the remedy as a matter of practice permitted the creditor to sue direct.

*Colton* v. *Mayer*, 90 Md. 711, p. 714.

Since the suit was based on a fiction of contract it became necessary under the common law rules of pleading and procedure for the creditor to show that the stockholder was a stockholder when he became a creditor with the ensuing result that the creditor was permitted to sue a stockholder for debts of the bank incurred while he was such even after the transfer of his stock. The right of set off was also allowed as a matter of procedure and pleading.

As stated so clearly by the Court of Appeals of Maryland in the instant case (*Ghingher* v. *Bachtell, supra*) the right of recovery down to 1904 so far as banks doing a trust business were concerned and down to 1910 so far as banks conducting solely and strictly a banking business were concerned was based upon the fiction of a contract and the enforcement of that liability by the Courts in order to give some remedy to creditors was based upon the fundamental principles involved generally in the enforcement of

contracts. Consequently when the creditor, who had no other means provided for him, undertook to collect from a stockholder the statutory liability of stockholders he was obliged to show as in other cases of contract, guaranty and suretyship that the stockholder whom he sued was a stockholder at the time his deposit was made or debt incurred. In the absence of any statute amplifying the constitutional provisions and providing means for its enforcement, the Courts of Maryland through a long series of cases proceeded upon the principle of this so called fictional contract in order to prevent a failure of the constitutional mandate. For this reason the many cases in Maryland cited by the appellants in their brief purporting to define the incidents of the liability of stockholders prior to 1904 have no application to the present case as stated by Chief Judge Boyd in the case of *Murphy* v. *Wheatley, supra,* in which on page 517 he says "As the Legislature has changed the liability of stockholders of these companies by the Act of 1904 the decision of the question may no longer be important as a precedent, but the rights of the parties to this suit are to be determined according to the existing laws of this State when that Act was passed".

D. THE REMEDY UNDER THESE OLDER DECISIONS DEALING WITH CASES PRIOR TO THE CHANGE OF PROCEDURE IN 1904 WAS A MOST UNCERTAIN AND PRECARIOUS ONE.

The theory of procedure invoked by the courts involved a race of diligence among creditors to sue individual stockholders, brought about a multiplicity of suits, made it possible for stockholders to prefer individual creditors, to make compromise settlements and to set off obligations to the disadvantage of other creditors, opened the way for collusion whereby a few inside creditors might exhaust the liability of the only solvent stockholders, permitted

friendly creditors to favor individual stockholders by release, waiver, etc.

There was no equality of remedy among creditors and no proportionate responsibility among stockholders. A stockholder could be sued up to the par value of his shares although the amount so recovered exceeded his share of the corporate deficit leaving him to sue his fellow stockholders for contribution.

This procedure was originally invoked in the cases of business and manufacturing corporations with few stockholders. When applied by analogy to banking corporations and trust companies what appeared to be a fair remedy became entirely illusory because of the practical impossibility with which creditors of large corporations were met in ascertaining what stockholders to sue.

For example in the instant case the Hagerstown Bank and Trust Company at the time of its closing had thousands of general creditors and about six hundred and fifty stockholders. The accounts of practically every customer were constantly changing and as a practical matter it would be impossible with constantly varying daily balances to determine the date or hundreds of dates when the liability due to any one particular depositor arose, and with the many transfers of stock in a bank of the size of the bank in question which had 55,000 shares of stock outstanding it would present to each of the thousands of depositors and creditors the difficult if not impossible task of determining who were the stockholders at the different times his particular deposits were made or debts accrued.

The underlying reason why the stockholders of the Hagerstown Bank and Trust Company are prosecuting this appeal is the hope that by obtaining an adjudication of Court sustaining their contention they will make it impossible for the creditors of the corporation to collect any part of the statutory liability. If they can have sustained

the contention which they are making, under the guise of protecting by legal sophistry a theoretical right of the creditors against stockholders, they will succeed as a practical matter in destroying the substantive right of creditors and depositors and thereby nullify the whole purpose of the constitutional and statutory provisions of the State of Maryland which were enacted for the purpose of furnishing creditors and depositors of banks and trust companies with the added asset of stockholders liability to the extent of the full par value of the shares of stock in the corporation, in this case amounting to $550,000.00.

This former remedial procedure in Maryland was characterized by the Maryland Court of Appeals in the case of *Pittsburgh Steel Company* v. *Baltimore Equitable Society,* 113 Md. 77, at page 82 in the following language:

> "The separate right of action at law existing in the creditors against the stockholder before the passage of the Act, although having had the appearance of a reliable and efficient remedy has been found upon close scrutiny, to have been in practice a precarious and uncertain one."

This case was reviewed by the Supreme Court of the United States in *Pittsburgh Steel Company* v. *Baltimore Equitable Society,* 226 U. S. 455, 33 S. Ct. 167, in which case the creditor's remedy against the stockholders under the former procedure is characterized as follows:

> "The plaintiff's supposed contract was subject to peculiar infirmities. His right was shared equally by all other creditors of the corporation, and not only might some other creditor by diligence have got in ahead of the plaintiff and have exhausted the fund for which the defendant could be held, but the right depended on the stockholder's will. As was observed by Judge Rose, following the Maryland cases, in Re-

public Iron & Steel Co. *vs.* Carlton, 189 Fed. 126, 137, the statute does no more than the stockholder was free to do before. He could have paid the corporation or a receiver or other creditors. The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact,—of what the remedy amounted to in practice. It is admitted that bringing the action gave the plaintiff no lien, as it seems mistakenly to have been assumed to do in Myers *v.* Knickerbocker Trust Co., 1 L. R. A. (N. S.) 1171, 71 C. C. A. 199, 139 Fed. 111, 116. The Court of Appeals states that the remedy has been found in practice an uncertain one, less efficacious than that which is substituted. There is nothing to contradict their statement as to what experience has taught. With that fact before us and also the absolute dependence of the creditor upon the will of the stockholder, we can not go into nice speculation as to the probable result of this particular case, or say that the decision was wrong. The power of the state to make similar changes of remedy is asserted in more general terms than we have employed, in Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 755; 30 L. Ed. 825, 828; 7 Sup. Ct. Rep. 757. See also Henley *v.* Myers, 215 U. S. 373, 385; 54 L. Ed. 240, 246; 30 Sup. Ct. Rep. 148"

A return to the old method of procedure as stated by the Maryland Court of Appeals in the opinion filed in the instant case "would engulf all concerned in a swirling flood of litigation so lengthy, so tedious, and so costly that ultimately the inconclusive and discouraging nature of resort thereto would defeat the very end to be achieved by the basic law".

*Ghingher* v. *Bachtell*, 169 Md. 678, 693.

E. NO CREDITOR HAS THE RIGHT TO COMPLAIN OF A CHANGE IN THE STATUTE LAW MODIFYING OR TAKING AWAY A RIGHT OR REMEDY PROVIDED HE BE GIVEN IN SUBSTITUTION THEREFOR A RIGHT OR REMEDY SUBSTANTIALLY EQUIVALENT THERETO.

The creditor has no right to complain of a statutory change in the remedy for the enforcement of a contractual obligation, even to the extent of abolishing entirely the remedy in force at the time the contract was entered into, provided the method substituted therefor be substantially equivalent in coercive force to that provided by law when the obligation was contracted.

*B. & O. R. R. Co.* v. *Maughlin,* 153 Md. 367, p. 376-378.

Substitution of action by receiver to collect statutory liability in place of individual action by the creditor has been frequently upheld by the courts as a remedial measure.

*Mister* v. *Thomas,* 122 Md. 459;
*Hughes* v. *Hall,* 117 Md. 552;
*Wheatley* v. *Glover,* 125 Ga. 551, 54 S. E. 626;
*Elson* v. *Wright,* 134 Iowa 634, 112 N. W. 105;
*Lynch* v. *Jacobson,* 55 Utah 129, 184 Pac. 929;
*Springhorn* v. *Dirks,* 72 Mont. 121, 231 Pac. 912;
*Lamar* v. *Taylor,* 141 Ga. 227, 80 S. E. 1085.

It is within the power of the Legislature of a State to change the remedy of creditors against stockholders for collection of statutory liability provided an equally efficacious one is substituted.

*Pittsburgh Steel Co.* v. *Baltimore Equitable Society,* 226 U. S. 455, 33 S. Ct. 117.

F. THE REMEDY OF CREDITORS UNDER THE PRESENT STATUTE IS MORE EFFECTIVE AND PROTECTS THEIR RIGHTS MORE SUBSTANTIALLY THAN THE ONE UPON WHICH THEY WERE FORCED TO RELY PRIOR TO ITS ENACTMENT.

In order to remove the difficulties confronting creditors in large banks and trust companies operating in recent times, to prevent multiplicity of suits and to provide a simple, efficient and substantial remedy for the protection of creditors and depositors of such corporations, the language of the United States statute imposing liability upon stockholders of national banks was adopted by the General Assembly of Maryland in Chapter 101 of the Acts of 1904, Chapter 153 of the Acts of 1908 and Chapter 219 of the Acts of 1910.

> U. S. Revised Statutes Section 5151 (United States Code, Title 12, Section 63, Acts of Congress June 3, 1864, Ch. 106, paragraph 12).

The changed method of enforcement is based chiefly upon procedure. The remedy provided is simple, adequate, and efficacious. The ascertainment and collection of stockholders' liability under the new statute must be done by orderly process through the courts and by an impartial receiver under the Court's jurisdiction. The incidental loss of the right of set-off under the new procedure would work to the benefit of the creditor and not to his detriment.

Attention is called to the fact that of the present capital stock of the corporation amounting to an aggregate par value of $550,000.00, only $150,000.00 was originally issued upon the organization of the corporation (R. 28). The record shows that $300,000.00 of the capital stock was authorized by amendment and issued subsequent to December

4, 1928, and there is nothing in the record to show that the other $100,000.00 was issued prior to June 1, 1910, when Chapter 219 of the Acts of 1910 went into effect. All these stockholders as well as all depositors and creditors extending credit to the corporation had the right to regard the contract between themselves and the corporation as being determined by said last mentioned statute. Likewise all stockholders who subscribed for the original issue of stock when the corporation was organized on June 1, 1908, and all depositors and creditors doing business with the corporation after that date were entitled to regard their rights and liabilities as defined by Chapter 153 of the Acts of 1908 then in effect. There is no question as to the constitutionality of these statutes under the Maryland Constitution and until the instant cases the Maryland Court of Appeals has never been called upon to construe them. The contention of the appellants in this case, that the liability of these stockholders and the rights of these creditors should be determined by anachronistic theories of preexisting law, would, if sustained, be a substantial impairment of the contractual rights of both stockholders and creditors in violation of the contract clause of the Federal Constitution.

**Conclusion.**

For the reasons hereinabove set forth it is respectfully submitted that the appeal in the instant case should be dismissed and the decree of the Court of Appeals of Maryland appealed from should be affirmed with costs to the Appellee.

In the absence of counsel, the Appellee is willing to submit its cause on this brief.

Respectfully submitted,

ROBERT H. MCCAULEY,
J. LLOYD HARSHMAN,
*Counsel for Appellee.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 298 and 299.—October Term, 1936.

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| Stockholders of the Peoples Banking Company of Smithsburg, Maryland, Appellants, vs. Warren F. Sterling, Receiver for the Peoples Banking Company of Smithsburg. | Appeals from the Court of Appeals of the State of Maryland. |
| Stockholders of the Hagerstown Bank and Trust Company, Appellants, vs. Warren F. Sterling, Receiver for Hagerstown Bank and Trust Company, etc. | |

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[February 1, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

Stockholders in banking corporations, charged with personal liability, contend that a statute of Maryland defining the form of liability and its measure offends against the Constitution of the United States by impairing the obligation of contracts previously made.

In No. 298, the liability in controversy is that of stockholders in the Peoples Banking Company of Smithsburg, which was incorporated under the laws of Maryland, January 24, 1910, and closed its doors June 29, 1931. The Bank Commissioner of the state, after being appointed receiver, filed a petition with a Circuit Court in Maryland for an order assessing the stockholders of record in an amount equal to 100% of the par value of their shares. An order was made accordingly in conformity with the provisions of Acts, 1910, Chapter 219 (Code of Maryland, Article II, § 72). Thereafter the appellants filed petitions for the revocation of the order, alleging the invalidity of the statute imposing liability, and alleging also that those of them who had paid the assessments

before joining in the petitions had done so by mistake. At the date of liquidation appellants were the holders of over 2000 shares of stock. Thirteen appellants had become the holders of a relatively small portion of these shares (345) before the enactment of the applicable statute. Nearly all the appellants were depositors in the insolvent bank and were thus creditors as well as stockholders. The Circuit Court for Washington County, Maryland, granted the petitions, holding the statute void as an impairment of existing contracts. The Court of Appeals reversed, and adjudged the statute valid. *Ghingher* v. *Bachtell,* 169 Md. 678. The case is here upon appeal. Judicial Code, § 237; 28 U. S. C. § 344.

In No. 299, the liability in controversy is that of stockholders in the Hagerstown Bank and Trust Company, which was incorporated in 1902. The trust company was closed in February, 1933, and in January, 1935, an order was made for the assessment of all the stockholders to the extent of 100% of the par value of their shares, provided that no good cause was shown to the contrary within a stated time. The appellants in this case, unlike some of the appellants in No. 298, acquired their shares after the enactment of the 1910 statute. Even so, they appeared within the time limit in opposition to the assessment, asserting that the statute was invalid as to them. The Circuit Court of Washington County sustained their opposition, and the Court of Appeals reversed. *Ghingher* v. *Kausler,* 169 Md. 696. In this case also the controversy is here upon appeal.

The questions in the two cases will be considered separately.

*First: The case of the Peoples Banking Company of Smithsburg.*

The Constitution of Maryland provides that "the General Assembly shall grant no charter for Banking purposes . . . except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise." Maryland Constitution, 1867, Article III, section 39. This provision was effective without more to impose a substantive liability upon stockholders in banks. *Ghingher* v. *Bachtell, supra,* pp. 688, 690. On the other hand, it did not take from the legislature the power to implement the liability with statutory remedies, nor in the absence of such statutes did it take that power from the courts. *Ghingher* v. *Bachtell, supra.* In January, 1910, when the

Smithsburg bank was organized, the only applicable statute was Chapter 206 of the Acts of 1870. The Act shows by its title that it is one "to create State Banking Institutions to enable the several Banks in this State—State and National—to avail of the provisions thereof." It provides (section 11) that "the continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this Act and every part of it may be altered from time to time, or repealed by the Legislature". The Maryland courts have held in a series of decisions that the liability thus recognized was not enforcible by the bank itself in the event of its insolvency, or by a liquidator or receiver suing in it behalf. *Ghingher* v. *Bachtell, supra; Miners Bank* v. *Snyder,* 100 Md. 57, 67; *Colton* v. *Mayer,* 90 Md. 711, 714. The right of action was no part of the assets of the insolvent corporation. The meaning of the statute was thought to be that every creditor of the corporation in assuming that relation acquired for his individual use, and not as a class representative, a supplemental right of action against the holders of the shares. To rationalize this right of action, it was said to rest upon an implied contract between the creditor on the one side and on the other the holders of the shares at the creation of the debt. *Ghingher* v. *Bachtell, supra.* Contract being the basis of the statutory remedy, the courts deduced the consequence that the liability did not extend to stockholders who became such after the debt was in existence. For the same reason any stockholder was free to reduce his liability by the use of set-offs or counterclaims available at the time of suit against the primary obligor. *Ghingher* v. *Bachtell, supra,* p. 694; *Cahill* v. *Original Big Gun Association,* 94 Md. 353.

In June, 1910, less than five months after the incorporation of this bank, a statute was enacted, abrogating the remedy under the then existing statute and substituting another. Acts of 1910, c. 219; Maryland Code, Article II, section 72 "Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof,

in addition to the amount invested in such stock . . . and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction." A like remedy had previously been created against stockholders in trust companies. Acts of 1904, c. 101; Acts of 1908, c. 153. Through these amendatory acts, the cause of action formerly enforcible by the creditors separately, each suing for himself, became enforcible by the receiver as the representative of all. As a consequence of the new procedure, the assessment was to be laid upon all the holders of shares at the time of liquidation without reference to their relation to the bank at the creation of the debts, though stockholders dropping out sooner might escape a liability which under the earlier law would have clung to them indefinitely. Moreover, offsets and counterclaims were no longer to be available to reduce the several assessments and thus establish inequality. Stockholders when sued by the receiver would contribute to the fund ratably, and then prove their claims against the bank in the same way as other creditors. Such in outline is the effect of the statutory changes as the highest court of Maryland has defined them in this very case.

Do changes of that order impair the obligation of a contract between the corporation and the stockholders in contravention of the provisions of the Constitution of the United States?

The answer must be "no", and this for two reasons, first, because the changes are directed to the implementing remedies rather than the substantive liability, and second, because a change of substantive liability was made permissible by the reservation of a power of alteration or repeal.

(1) The obligation laid upon the shareholders by the Maryland Constitution, though susceptible of legislative and judicial regulation in respect of the mode of its enforcement, was a substantive liability to which every stockholder subjected himself upon the acquisition of his stock. The legislature did not exhaust the measure of that constitutional liability by the creation of a particular remedial device. The remedy adopted was interpreted judicially

as having in view a suit by a creditor against the particular group of stockholders who had undertaken by implication to answer for his debt. This does not mean that a different form of remedy, for example a suit by a receiver, would have been a departure from the Constitution, if the statute had prescribed that method of enforcement. The broad but indefinite words of the constitutional command gave permission to the legislature to establish any remedies reasonably appropriate to the general end in view. Cf. *Whitman* v. *Oxford National Bank*, 176 U. S. 559, 562; *Bernheimer* v. *Converse*, 206 U. S. 516, 529. So, the broad but indefinite words of the legislation first adopted, the Act of 1870, gave freedom to the courts to develop through the process of construction a cause of action enforcible at the instance of a creditor without asserting in so doing that a different cause of action, enforcible through a receiver, would have been an inappropriate implement of the constitutional liability, in the event that the legislature or the courts had chosen to adopt it. Stockholders who became such while the first statute was in force were chargeable with notice that a new remedy might be adopted if the one first chosen was inadequate. They would have been chargeable with such notice though nothing had been said. They were chargeable, as it happens, by the wording of the statute, the charter being granted upon the condition that the Act or any part of it might be altered or repealed.

The remedy first established was found to be unworkable. *Ghingher* v. *Bachtell*, supra, at p. 692; *Murphy* v. *Wheatley*, 102 Md. 501, 515. Still acting within the limits of the constitutional command, the legislature of Maryland announced another remedy, less unwieldy and confusing. In the view of the state court, the substantive liability as the Constitution had created it was the same under the new procedure as it had been from the beginning. *Ghingher* v. *Bachtell*, supra. The court was far from holding that the statute had enlarged it. What had happened was merely this, that another remedy had been established to implement a liability created long ago. Cf. *Pittsburgh Steel Co.* v. *Baltimore Equitable Society*, 226 U. S. 455; *Hill* v. *Merchants' Mutual Ins. Co.*, 134 U. S. 515; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 755; *Shriver* v. *Woodbine Savings Bank*, 285 U. S. 467, 474, 479. We cannot see in this an attempt to lay upon the stockholders

by force of later legislation a new and different burden from that accepted at the outset. Nor would it help the appellants anything to assume in their behalf that the Constitution of the State has been given a new meaning, if the new meaning is not due to the compulsion of a statute. Change by judicial construction of antecedent legislation does not impair a contract, at least in the forbidden sense, if it be granted *arguendo* that such a change can be discovered. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 450; *Fleming* v. *Fleming*, 264 U. S. 29, 31; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364. The new meaning, if there is any, is not ascribed to the Constitution because a later statute has said it must be done. The new meaning is the product of the independent judgment of a court. So the state court has told us, and the good faith of its declaration is not successfully impeached. *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540. To changes thus wrought the Constitution of the United States does not offer an impediment.

(2) The result would not be different if the effect of the statutory amendments were to be viewed as an enlargement of the substantive liability for debts afterwards contracted, the enlargement being applicable to stockholders without exception, present as well as future. The charter was accepted subject to the condition that the personal liability then prescribed by statute should be subject thereafter to repeal or alteration. This court has held that when such a condition attaches to a charter, there is no unconstitutional change of the obligation of a contract by a subsequent enlargement of the liability of stockholders as to debts afterwards contracted, though the shares so affected were acquired before the change was made. *Sherman* v. *Smith*, 1 Black 587, affirming 21 N. Y. 9; *Looker* v. *Maynard*, 179 U. S. 46, 53; cf. *McGowan* v. *McDonald*, 111 Cal. 57, 66; *Perkins* v. *Coffin*, 84 Conn. 275, 295; *Pate* v. *Bank of Newton*, 116 Miss. 666, 686. Stockholders who subscribe to stock subject to such a condition assume the risk that their relation to the corporation may be altered to their prejudice. Nor is their position any stronger because the new liability is heavier (if so it be assumed to be) than that imposed upon them directly by the Constitution of the State. The constitutional lia-

bility is not a maximum, but a minimum, and the legislature does not transcend the bounds of legislative power by increasing it thereafter. *Murphy* v. *Wheatley*, supra, p. 514, 515, 516; *Davis* v. Moore, 130 Ark 128, 135; *Parker* v. *Carolina Savings Bank*, 53 S. C. 583, 592; *Duke* v. *Force*, 120 Wash. 599, 606.

*Sherman* v. *Smith*, supra, left unanswered an inquiry (1 Black at p. 594) whether the amendment would have gone too far if it had been made applicable to debts existing at the date of its enactment as well as to existing stockholders. We may leave the question open now. Appellants have failed to show that any debts of the corporation to be enforced in these proceedings were debts existing on June 1, 1910, when the present statute became law, still less that the subtraction of those debts would have made the assessment lower than the par value of the shares. The extent of the deficiency is persuasive, in the absence of evidence to the contrary, that the assessment must have been the same if the old debts had been disregarded. Such of them as exist must have been contracted in the brief interval between January 24, 1910 and June 1 following. At all events, the burden was on the appellants to show themselves harmed through the operation of the statute challenged as unlawful. *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226, 227; *Hatch* v. *Reardon*, 204 U. S. 152, 160, 161. This they have not done. As to debts to be contracted afterwards, if not also as to others, the statute is impregnable.

What has been written is not at war with anything decided or even intimated in *Coombes* v. *Getz* 285 U. S. 434, 441, 442, much relied on by appellants. There *creditors* were complaining of the destruction of a cause of action whereby they were left without a remedy. Here the record does not tell us that any creditors who were such when the first statute was repealed have claims still outstanding for debts contracted then. In the usual course of business deposits made so long ago must almost certainly have been paid through the application of the principle that the first drawings out are to be attributed to the first payments in. *Carson* v. *Federal Reserve Bank*, 254 N. Y. 218, 232. At any rate, there is nothing to the contrary in the pages of this record. The fact is thus apparent that the contract rights of creditors are not involved at all. Whatever complaint is heard as to the substitution of a new remedy

in 1910 is not from creditors of that date, unable to collect their debts. The complaint comes to us from stockholders, who took their stock with notice that the remedies against them might be changed from time to time.*

*Second: The case of the Hagerstown Bank and Trust Company.*

As already pointed out, all the complaining stockholders in this company acquired their shares after the adoption of the Act of 1910, with its new remedial devices. What has been said as to the stockholders in the Peoples Banking Company of Smithsburg applies with redoubled force to the stockholders in the trust company.

The decree in each case should be

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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* "The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts *of third persons* may be destroyed or impaired." Coombes *v.* Getz, *supra*, pp. 441, 442.